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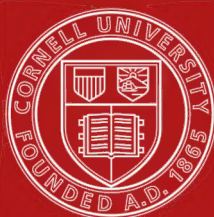
**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**

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REPORTS OF CASES

AT

LAW AND EQUITY

AND IN THE

ADMIRALTY

DETERMINED IN THE

*Circuit Court of the United States*

FOR THE

DISTRICT OF MARYLAND

BY

ROGER BROOKE TANEY,

CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

APRIL TERM 1836 TO APRIL TERM 1861.

BY

JAMES MASON CAMPBELL,

OF THE BALTIMORE BAR.

PHILADELPHIA:

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## C A R D .

As circumstances prevented the publication of this volume during the lifetime of the Compiler, the laborious and important duty of reading the proof necessarily devolved upon others.

In this emergency, Mr. BRIGHTLY, of the Philadelphia bar, most kindly offered his services. The family of the late Chief Justice desire to express their appreciation of the motives which prompted him to this "labor of love," while they feel assured they may unite with the profession in the opinion

Nil tangit quod non *ÆQUIPARAT*.

F. M. E.



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CASES AT LAW,  
IN  
EQUITY AND ADMIRALTY,  
DETERMINED IN THE  
CIRCUIT COURT OF THE UNITED STATES,  
FOR THE DISTRICT OF MARYLAND.

---

JOHN S. GITTINGS

*vs.*

JOHN CRAWFORD.

In the second section of the 3d article of the Constitution of the United States, it is declared that "in all cases affecting ambassadors, other public ministers, *and consuls*, and those in which a state shall be a party, the supreme court shall have original jurisdiction:" *held*, that this does not conflict with and render unconstitutional the act of congress passed 24th September 1789, sect. 9, giving jurisdiction to the district court of the United States, in civil cases, against consuls and vice-consuls.

The grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive.

A consul is not entitled, *by the laws of nations*, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides.

Circuit Court, April Term, 1838. Error to the District Court.

TANEY, C. J. The suit in this case was brought by John S. Gittings against John Crawford, upon a promissory note

Gittings v. Crawford.

made by Crawford to Gittings, for \$980, dated December 27, 1834, and payable twenty days after date. The writ stated the plaintiff to be a citizen of the state of Maryland, and the defendant to be the consul of his Britannic majesty. The defendant appeared to the suit, and moved to quash the writ, on the ground that the district court had no jurisdiction over the case; the court below sustained the motion, quashed the writ, and gave judgment in favor of the defendant for costs. The case has been brought here by the plaintiff, by writ of error, and the question to be now decided by this court is, whether the act of congress of September 24, 1789, § 9, giving jurisdiction to the district court of the United States, in cases of this description, against consuls and vice-consuls, is constitutional or not.

The clause of the constitution of the United States which is supposed to be violated by this law, is that part of the 2d section of the 3d article, which declares that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." It is insisted, that the grant of original jurisdiction in these cases to the supreme court, means *exclusive* original jurisdiction, and that it is not in the power of congress to confer original jurisdiction, in the cases there mentioned, upon any other court.

The question thus presented for the decision of the circuit court, is certainly a difficult and embarrassed one. Different opinions have been expressed upon it by eminent men in high judicial stations; and the difficulties which arise from the words of the constitution itself have been greatly multiplied by the different constructions, which, at different times, have been given to the clause in question.

The earliest case upon the subject is in 2 Dall. 297, *United States v. Ravara*, in the year 1793. That was an indictment in the circuit court against a consul, for a misdemeanor; and the counsel for the defendant moved to quash the indict-

*Gittings v. Crawford.*

ment, upon the ground that the clause of the constitution above quoted vested exclusive jurisdiction in such cases in the supreme court, and that the act of 1789, which conferred original jurisdiction on the circuit court, was unconstitutional and void. A majority of the court, however, overruled the objection, and decided that the grant of original jurisdiction to the supreme court was not exclusive; that congress might vest original jurisdiction, in the cases there enumerated, in other courts, and that the act of 1789, conferring jurisdiction upon the circuit court, was constitutional and valid. At a subsequent term of the circuit court, in 1794, the case came up for trial, Chief Justice Jay presiding, and the court charged that the defendant was not privileged from prosecution in virtue of his consular appointment, and the jury, under that charge, found him guilty.

It appears, then, that in the circuit court, upon two different occasions, it was held, that the jurisdiction conferred by the constitution upon the supreme court, in cases affecting consuls, was not exclusive. And these decisions were made by eminent and distinguished judges, some of whom had been members of the convention which framed the constitution, and all of whom had taken prominent and leading parts in the discussions which preceded its adoption by the people. These discussions have all the force and authority which courts have uniformly given to the contemporaneous construction of a law.

But the authority of the decisions in the circuit court was shaken by the case of *Marbury v. Madison*, 1 Cranch 137, where the question as to the construction of this clause of the constitution came, for the first time, before the supreme court. In the opinion delivered in that case, it was said, in general terms, by the court, that the original jurisdiction conferred on the supreme court was exclusive.

In *Cohens v. State of Virginia*, 6 Wheat. 378, the construction of this part of the constitution again came under consideration. And although the court reviewed and

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recalled some of the *dicta* in the case of *Marbury v. Madison*, yet what had been there said on the point now in question, was not disturbed, and the court again strongly intimated that the clause granting original jurisdiction to the supreme court was so far exclusive, that congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States.

And in *Osborn v. United States Bank*, 9 Wheat. 820, the chief justice distinctly expressed the opinion that the original jurisdiction granted to the supreme court, is exclusive, and cannot be given by congress to any other tribunal.

It is worthy of remark, that in two of these three cases in the supreme court, the question was upon the jurisdictions of that court, and not upon the jurisdiction of an inferior tribunal of the United States. And in the last of them, the question was upon the jurisdiction of the courts of the United States, as contradistinguished from the state courts; and the further question whether the case before them arose under a law of the United States. In neither of these three, was the point directly presented, whether congress could grant original jurisdiction to an inferior court, in the cases enumerated in the clause now in controversy. All therefore that was said by the court in these cases, on that question, was by way of argument and illustration, and not necessarily involved in the decision of the cases then before the court. And we are warned by the chief justice, in the opinion delivered by him in *Cohens v. Virginia*, that principles thus stated are not to be regarded as binding adjudications; and some of the principles strongly put forth by him in the case of *Marbury v. Madison*, are repudiated and overruled in *Cohens v. Virginia*.

Yet, after these repeated declarations of the opinion of the supreme court, so explicitly reiterated in the case of *Osborn v. United States Bank*, I should not have felt myself at liberty to adopt a different construction of the article in question, if the action of the supreme court on this subject had stopped with the last-mentioned case;



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for the controversy involves no right reserved to the states or secured to individual citizens. It is a question merely of the distribution of power among the courts of the United States, and when the supreme court had so repeatedly expressed its opinion, that that court, under the constitution, had exclusive original jurisdiction over the subject-matters enumerated in the clause now under consideration, it would hardly have been proper or decorous in the circuit court to disregard those opinions, although they were expressed when the point in controversy was not directly before it.

But the action of the supreme court did not stop with the cases above cited; the point in dispute was brought directly before the court in *United States v. Ortega*, 11 Wheat. 467. That case came before the supreme court upon a certificate of division of the judges of the circuit court, and the points presented by the certificate were—1. Whether it was a case affecting an ambassador or public minister; and—2. If it were such a case, was the act of 1789, giving original jurisdiction to the circuit court, constitutional or not? The court said it was not necessary to decide the second point, because they were of opinion that it was not a case affecting an ambassador or public minister. It can hardly be supposed, that the supreme court would have refused to express an opinion on the second point, if they had regarded the question as settled by the previous decisions of that court. The manner in which they treated it, when thus directly brought into discussion, shows that in their opinion, it was still an open one, and had not been concluded by anything said in the different opinions of the court to which I have before referred; and the reporter in a note to this case expressly states that the point in question had not been decided by the supreme court.

But in another and very late case the court have, in my judgment, distinctly affirmed the constitutionality of the act of 1789, on the very point in controversy. In the case of *Davis v. Packard*, 7 Peters 281, the question was brought

before the court by writ of error from the court of errors of New York, which court was supposed to have decided that a state court had jurisdiction in cases where a consul was concerned. It turned out afterwards, that the court had not so decided; but the supreme court, when the case came before them, interpreted the record otherwise, and, acting upon that interpretation, reviewed the judgment of the court of errors of New York. Judge Thompson, in delivering the judgment of the supreme court, says: "As an abstract question, it is difficult to understand, on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789, sect. 9, (1 Stat. 76) gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act." This language used by the court, with the point directly before them, can only be understood as an affirmation of the constitutionality of the act of 1789; for the exclusion of the state courts is not put upon the ground, that they were impliedly excluded by the grant of original jurisdiction in such cases to the supreme court; but the decision is placed on the grant of power to the courts of the United States generally, and on the act of 1789, which conferred the jurisdiction on the district courts, and excluded the state courts. No notice is taken, in that opinion, of the clause conferring original jurisdiction on the supreme court. The exclusion of the state courts is not derived from it, but from the act of 1789; so, of course, that act was deemed constitutional.

This decision is in conformity with the contemporaneous construction of the constitution, given by the circuit court in the case of the *United States v. Ravara*, before referred to. And although the authority of that case was much doubted, after the opinions delivered in *Marbury v. Madi-*

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son, *Cohens v. Virginia*, and *Osborn v. United States Bank*, and more especially on account of the high and just reputation of the eminent judge by whom those opinions were delivered, yet this vexed question ought, in my judgment, to be regarded as now settled by the case of *Davis v. Packard*.

It is worthy of remark, also, that the elementary writers, generally, seem to have regarded the act of 1789 as constitutional, and to have relied on the case of the *United States v. Ravara*: *vide* 11 Wheat. 473 (*note*); Rawle on the Const. 221, 222; Conkling 160; Sergeant 17, 18.

Independently, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of congress passed in 1789 a violation of the constitution. It was the first congress that met under the constitution, and in it were many men who had taken a prominent and leading part in framing and supporting that instrument, and who certainly well understood the meaning of the words they used. The fact that the law in question was passed by such a body, is strong evidence that the words of the constitution were not intended to forbid its passage.

Nor am I by any means satisfied that the words used require a different construction from that given to them by the act of 1789. There are no express words of exclusion in the clause which confers original jurisdiction, in the cases mentioned, upon the supreme court. Why should they be implied? They are clearly not implied in relation to the state courts, in the clause immediately preceding, which gives judicial power in certain cases to the courts of the United States; for there are some subjects there enumerated from which it never could have been designed to exclude altogether the state authorities. For example, the constitution of the United States is the supreme law in the several states, and the courts of the states are bound to respect and interpret it, and to declare any state law null and void which

violates its provisions. Again, the laws of congress, when passed in the exercise of its constitutional powers, are obligatory upon the state courts, and must be construed by the courts, and obeyed by them, whenever they come in conflict with the laws of the state. It is true, that the decisions of the state courts must be subordinate to, and subject to the revision of, the supreme court of the United States, to whom the ultimate decision of such questions belongs; yet, the state courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them. If the grant of jurisdiction to the courts of the United States, generally, is not, by implication, the exclusion of all other courts, in the cases enumerated in that grant of power, why should the grant of original jurisdiction to the supreme court in certain cases, in the very same section, and by the next succeeding clause, be held to imply such exclusion? The original jurisdiction conferred on the supreme court is not inconsistent with the exercise of original jurisdiction on the same subjects by the inferior courts of the United States, and there is no necessity, therefore, for implying an intention to exclude them.

Indeed, if the grant of original jurisdiction, in the cases mentioned, implied exclusion of jurisdiction on those subjects, the exclusion would seem most naturally to apply to the appellate jurisdiction of the court itself, and to prohibit it from the exercise of the latter in the cases where the former was given. The subject-matter of this part of the section is the jurisdiction of the supreme court, and it is divided into appellate and original. The cases are enumerated in which it shall have original jurisdiction; and appellate is given to it in others. Now it might very well be supposed, that in thus classing the subjects upon which it should have original, and upon which it should have appellate jurisdiction, the framers of the constitution meant to limit its jurisdiction in the manner in which it is

*Gittings v. Crawford.*

there divided, and to exclude it from original jurisdiction where appellate was given, and to exclude it from appellate where original was given; and this was supposed to be the construction given to it in the case of *Marbury v. Madison*, by the learned judge who delivered the opinion. But when the subject was further discussed and considered in the case of *Cohens v. State of Virginia*, it became manifest, that such a construction could not be sustained, without depriving the supreme court of some of its most important and necessary powers; powers which, from the whole frame of the instrument, it was evidently intended that the court should exercise; and which, although classed in its original jurisdiction, it could exercise only in an appellate form, when the question arose in a suit in a state court. The language used in *Marbury v. Madison* was therefore qualified and explained, and it was decided, that the grant of original jurisdiction, in the cases enumerated, to the supreme court, did not exclude from appellate jurisdiction over the same subjects. And this latter construction is now the established law of the country. If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the supreme court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter.

Nor is there anything in the official character and func-

*Gittings v. Crawford.*

tions of a consul which should lead us to suppose, that the framers of the constitution meant to confine cases affecting such officer exclusively to the supreme court. A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offence he may commit against its laws; Wheat. International Law 181; 1 Kent's Com. 43, 45. He, usually, is a person engaged in commerce; and in this country, as well as others, it often happens, that the consular office is conferred by a foreign government on one of our own citizens. It could hardly have been the intention of the statesmen who framed our constitution, to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul, in any part of the United States; that consul too, being often one of our own citizens. There is no reason, either of policy or convenience, for introducing such a provision in the constitution; and we cannot, with any probability, impute such a design to the great men who, with so much wisdom and foresight, framed the constitution of the United States; they have used no words expressly prohibiting congress from giving original jurisdiction in cases affecting consuls, to the inferior judicial tribunals of the United States; and in the absence of every express prohibition, I see no sufficient grounds to justify this court in implying it, and pronouncing, merely upon such implication, that the act of 1789 is unconstitutional and void.

Gittings v. Crawford.

The judgment of the district court in this case must, therefore, be reversed, and the motion to quash the writ which issued from that court overruled.

*McMahon*, for plaintiff in error.

*Johnson and Glenn*, for defendant in error.

---

SALTONSTALL and WIFE*vs.*

## STOCKTON and STOKES.

Where plaintiff sued the proprietors of a line of stage-coaches for damages sustained by his wife, through the upsetting of one of their coaches: *held*, that the plaintiff having proved that the carriage was upset and his wife injured, it was then incumbent on the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver.

Every one that undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care; the traveller can be carried in safety; when, therefore, a passenger is injured, the presumption is that it has been occasioned by negligence.

Justice, as well as the principles of evidence adopted in analogous cases, require, that any disaster by which a passenger suffers, should be *prima facie* evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary.

Questions as to negligence, and reasonable skill and care, in every description of business, are necessarily questions of fact, and belong to the jury; the court can do nothing more than give the rule by which they are to be tried.

Where the plaintiff imputes the accident to the misconduct of the driver, it is incumbent upon the defendant to prove that the driver possessed and exercised that degree of skill which competent drivers, employed in like business, usually possess, and ought to possess, in order to convey the passenger with safety and comfort, and that he exercised, at the time of the accident, the utmost prudence and caution.

The law requires of him a high degree of caution and prudence, and the least negligence on his part, which produces bodily injury to the passen-



## Saltonstall v. Stockton.

ger, will render the carrier liable. Unless the jury find that such skill and such care were used, the plaintiff is entitled to recover; provided, nothing was done by the plaintiff or his wife, which absolves the defendant from this liability.

Injuries received in cases of this description are not violations of a contract between the parties, but are breaches of the duty imposed by law on the carrier. They are torts. But the plaintiff may waive the tort and sue in assumpsit.

Those who undertake the business of carrying persons are regarded by law as if they were in the public service, and the carrier cannot refuse to take any one of good character, who conducts himself properly and pays the usual fare—provided he have room for him—and if he refuse, he is liable to an action.

Neglect of duty on the part of a carrier of persons, is a tort; and if an individual be injured by it, his rights, and the liability of the defendant, must depend upon the principles which govern in cases of tort, where a breach of a legal duty has been committed, and an individual suffers from it.

Although a man commit an unlawful act by digging a ditch or placing any other obstruction in a public highway, or by driving at a dangerous speed through a crowded street, and an individual be injured by it, the injured party cannot maintain an action, if it appear that he heedlessly and negligently came within reach of the danger, and did not use reasonable care to avoid it.

But if a man unlawfully place another in a situation which compels him to undergo one of two hazards, and force him to choose, upon the instant, between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted.

If there be the slightest evidence conducing to prove the fact, the question must be left to the jury; and even if there be some doubt whether there be any competent and legal evidence of the fact, the court would be unwilling to withdraw the question altogether from the jury, because it is to that tribunal that the law commits the decision upon controverted facts; and the court have no right to suppose that the jury would find a verdict upon slight and insufficient testimony, or without any testimony to warrant it.

Circuit Court United States. November Term, 1838.

TANEY, C. J. This is an action on the case brought by Saltonstall against the defendants, to recover damages for an injury sustained by his wife, by the upsetting of a stage-coach, of which the defendants were the owners. This suit is brought in the name of Saltonstall alone, but there

is a written agreement filed, by which any evidence may be offered that would be admissible in an action by the plaintiff and his wife, or the plaintiff alone, and any damages recovered that could be recovered in either form of action. It appears, that the defendants were the owners of a line of stages running from Baltimore to Wheeling, in which the plaintiff and his wife were passengers, in December 1835; that the coach was upset, between Hancock and Cumberland, and the plaintiff's wife severely injured and rendered a cripple for life.

On the part of the plaintiff, evidence was offered to show that the driver was drunk; that some time before the disaster happened, his conduct gave just cause of alarm to the passengers; that Mrs. Saltonstall had several times asked her husband to get on the box and take the reins; that at the top of a hill, where there was a gentle slope in the direction they were going, and the road perfectly safe, and the horses in a walk, they suddenly turned out from the road and wheeled round, until their heads were in the opposite direction to that in which they had been going; that as soon as it was discovered by the passengers, that the horses had turned out of the road, Saltonstall opened the door at the side of the carriage and sprang out, apparently to stop them; that his wife immediately followed, but fell as she touched the ground, and before she could recover, the carriage overturned and fell upon her; that the horses were docile and manageable, and that the carriage was upset by the misconduct of the driver in turning the horses short round, or suffering them to turn from his inability to manage them.

The defendant offered evidence to show that the driver was not drunk; that there was smooth ice in the road, and that his horses were slipping on it, and that he turned out as the best means of safety; that the stage would not have fallen over if the plaintiff and his wife had remained in it; but that standing, as it did, on a declivity, their weight thrown on the lower side, and the impulse given by

springing from it caused it to fall over on that side; (it was suggested by one of the witnesses that the driver was overcome by extreme cold, and physically unable to manage his horses;) that there were four passengers besides the plaintiff and his wife; that these four remained in the coach, and that none of them were materially injured; and that the plaintiff and his wife would probably have suffered little or no injury, if they had remained in the carriage.

Many prayers have been offered to the court upon this testimony, praying hypothetical instructions to the jury. We do not mean to express a separate opinion on each of them, because in a case like this, the prayers necessarily contain an hypothetical assumption of many facts to be found by the jury, some of which are not disputed, and others strongly controverted, and it is difficult for jurors who are not familiar with this mode of proceeding, to understand clearly the instructions of the court when given in this complicated form. We therefore reject all the instructions prayed for, and proceed to give the directions of the court to the jury, upon the law of the case, in that form in which we suppose the jury will be best able to comprehend them. It is proper, however, in the first place, to state the principles on which the opinion of the court is founded.

It is admitted on all hands that this action cannot be maintained, unless the injury complained of was caused by the want of skill or care on the part of the defendants or their agents; but after the plaintiff has proved that the carriage was upset and his wife injured, it is incumbent upon the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver. It is true, that the cases in the books do not altogether agree on this point, nor does it appear to be of much importance in the case before us; but as the point has been made, the court must decide it.

It is a general rule of evidence, that the burden of proof lies upon the party who has peculiar means of knowledge not within the reach of his adversary; and the exception to this rule is the class of cases, where the existence of the fact in controversy would make the party who is presumed to have the knowledge liable to a criminal proceeding; in such cases, the law, presuming his innocence, does not require him to prove it. The exception, of course, does not apply to the case before the court, and it clearly falls within the general rule; for the passengers, for the most part, are unacquainted with the condition of the carriage, the harness, and the horses; have no knowledge of the state of the road, and no skill in driving a coach; upon all of these points, they must seek information from the defendants or their agents, and without their permission, the injured party cannot even have access to the way-bill, to learn the names of his fellow-passengers, to whom he is often an entire stranger. The owners, on the contrary, have a perfect knowledge of every material circumstance, and if a disaster occurs, and was not produced by negligence or want of skill, it is always in their power to prove it. It is not a negative that they are required to prove, but an affirmative proposition, that is to say, that proper skill and care were employed; and to show how the accident happened without any fault on their part.

Moreover, every one who undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care, the traveller can be carried in safety. When, therefore, a passenger is injured, the presumption is, that it has been occasioned by negligence; and this presumption is the necessary consequence of the admission which the carrier makes, by undertaking the business and inviting the public to use the conveyance he provides; if the rule were otherwise, the right of action which the law gives would in most instances be rendered nugatory by the rule of evidence. How, for example, could a passenger in a

steamboat or railroad car, point out the imperfection of the complicated machinery by which it is propelled: yet the same rule of evidence as to negligence must prevail in relation to every carrier of passengers, whether by stage-coaches conducted by horse power, or in steamboats or railroad cars driven by steam. Justice, as well as the principles of evidence adopted in analogous cases, require that any disaster by which a passenger suffers should be *prima facie* evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary.

The burden of proof, therefore, being upon the defendants, the question arises, what is the degree of skill and care which they are bound to exercise? The counsel on both sides have asked the court for instructions to the jury, which imply that it is the province of the court to decide, as a matter of law, that certain acts amount to negligence. Questions as to negligence and reasonable skill and care in every description of business, are necessarily questions of fact, and belong to the jury; and the court can do nothing more than give the rule by which they are to be tried. In this case, the plaintiff does not allege that there was any defect in the carriage, or harness, or horses; he imputes the accident altogether to the misconduct of the driver. It is incumbent, therefore, upon the defendant to prove that the driver possessed and exercised that degree of skill which competent drivers, in like business, usually possess, and ought to possess, in order to convey the passengers with safety and comfort; and that he exercised, at the time of the accident, the utmost prudence and caution; for in performing a duty of this kind, where the lives and health of so many citizens are intrusted to his care, the law requires of him a high degree of caution and prudence, and the least negligence on his part, which produces bodily injury to the passenger, will render the carrier liable. Unless, therefore, the jury find that such skill and such care were used, the plaintiff is entitled to recover, provided

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nothing was done by the plaintiff, or his wife, which absolves the defendants from their liability.

And this brings us to the next point in the case, upon which the chief stress of the argument has been laid, and upon which it seems to be supposed that the issue of the case will mainly depend.

The counsel for the defendants insist that the severe injury which the plaintiff's wife received, was caused by her leaping from the stage; that if she had not done so, the carriage would not have upset; and even if it had been overturned, she would have been less injured: that although the driver may have been guilty of negligence, yet, as she contributed to produce the injury she suffered, by her own act, the plaintiff is not entitled to recover, because her own imprudence was the proximate cause of the injury, and not the misconduct of the driver. And in support of this position, they have referred the court to the cases where it has been held that, if a man drive heedlessly and negligently on the wrong side of the road; or at a dangerous speed, in a public street; or place an unlawful obstruction in a highway; and an individual is injured in consequence of any of these unlawful acts, he is not entitled to recover, if he contributed, in any degree, to produce the injury, by his own improvidence or want of care.

On the other hand, the plaintiff contends that the present case is distinguishable from those relied on, inasmuch as the action, although an action on the case, is yet founded on a contract between the parties, and the rights and duties of each are dependent on the stipulations in the agreement; that the defendants by their contract undertook and promised that the plaintiff and his wife should be carried with proper skill and care; that the contract was broken by the misconduct of the driver, and the plaintiff therefore is entitled to recover, even although they may have contributed to increase the danger and add to the injury by leaping from the stage.

The court think the case before them is distinguishable

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from the cases relied on by the counsel for the defendants; but we are not prepared to say that the distinction taken by the plaintiff can be maintained, and doubt whether his case would be strengthened by placing it on that footing.

It is not suggested that there was any special agreement between the parties; but the plaintiff refers to the contract implied by law. Now this implied contract of the defendants must have reasonable limitations, and there must be correlative obligations implied on the part of the passenger. The undertaking of the carrier that the passenger shall not suffer from negligence, would seem naturally to be confined to the time that the passenger remains in the vehicle in which he is to be carried, and when he is entering or departing from it with the assent of the carrier, and according to the usage on the route; and corresponding stipulations on the part of the passenger for his conduct must also be implied. Upon such an agreement, it might, perhaps, be held that the plaintiff's wife committed a breach of the agreement, by leaving the carriage in an imprudent manner, and at a time when it was dangerous to do so; and thereby made her election to rely for safety on her own exertions and not on the contract of the defendants. The negligence of the defendants would give no right of action, unless it caused injury to the plaintiff or his wife; and if it was the immediate consequence of her own breach of contract, and would not have happened without it, it would be difficult, upon principles which regulate the construction of contracts, to say that the defendants must answer for the damage, because of their previous breach of contract, although that breach had produced no injury.

But injuries received in cases of this description are not violations of a contract between the parties, but are breaches of the duty imposed by law upon the carrier; they are torts. The plaintiff might, without doubt, have sued in *assumpsit*; but there are many cases where the law implies a contract, where there was, in fact, no agree-



ment between the parties; this is done in order to give the plaintiff a more convenient remedy for his right, by enabling him to sue in *assumpsit*. And there are cases where an individual who has sustained an injury from the breach of a legal duty, may waive the tort and sue as upon a contract; this is the case with innkeepers and their guests, where property entrusted to the care of the innkeeper has been lost by his breach of duty; yet the obligations of innkeepers in that respect are prescribed by law, and their neglect is not a violation of contract, but a breach of the duty which the law imposes, and it is always so described in the ancient writs. (*Calve's Case*, 8 Co. 32; *Fitzh. N. Brev.* 94; *Reg. Brev.*, *Trespass* 105.) And if the relation in which the carrier and passenger stand to one another—to wit, that of bailor and bailee—can be said to be created by contract, yet, as soon as that relation subsists, the law interposes and prescribes the rights and duties, and liabilities of both parties; it regulates the degree of skill and care with which the passenger is to be carried, and any negligence on the part of the carrier, is an unlawful act, is a breach of legal duty. (*Story on Bailm.* § 601.) Indeed, even the relation of bailor and bailee is not created by contract; for those who undertake the business of carrying persons are regarded by law as if they were in the public service, and the carrier cannot refuse to take any one of good character who conducts himself properly and pays the usual fare (provided he has room for him), and if he refuses, he is liable to an action; so that the passenger takes his seat upon paying the usual fare, not by force of a right acquired by contract with the carrier, but in the exercise of a right secured to him by law; a right which the carrier cannot resist without committing a breach of a legal duty. In some instances, as in the case of railroads, even the amount of fare is prescribed by law, and the carrier is bound to take the passenger that offers it, if he has accommodation for him; and cases can hardly be said to be cases of contract, in which one of the parties has no option, and is com-

pelled by law to carry the passenger, if the passenger requires it. Neglect of duty, therefore, on the part of a carrier of persons, is a tort; and if an individual is injured by it, his rights and the liability of the defendants must depend upon the principles which govern in cases of tort, where a breach of a legal duty has been committed and an individual suffers from it.

Considering the case before us in this point of view, it is certainly well settled by the cases referred to by the defendants, that although a man commits an unlawful act by digging a ditch, or placing any other obstruction in a public highway, or by driving at a dangerous speed through a crowded street, and an individual is injured by it, the injured party cannot maintain an action, if it appears that he heedlessly and negligently came within the reach of danger, and did not use reasonable care to avoid it. In these cases, however, the unlawful act of the defendant was not the immediate and proximate cause of the injury; the cases all turn upon the fact that the plaintiff brought the danger immediately upon himself, and placed himself within its grasp, by his own want of reasonable care, and that if he had exercised ordinary caution it would not have reached him; as the immediate cause of the injury, therefore, was his own negligence, and not the negligence of the defendant, he cannot recover.

But the case before us is a very different one; the misconduct of the driver placed the plaintiff and his wife in immediate peril; for, according to the hypothesis of fact assumed and conceded, so far as concerns this point, the carriage was in danger of upsetting every moment; the driver, from intoxication, had become incapable of managing his horses, and they had left the road and were turning the carriage in an opposite direction to that in which they were before going. If the jury find these to be the facts in the case, then the negligence of the driver had placed every passenger in immediate danger; the peril which his negligence occasioned did not find them in a place of safety,

from which they carelessly and improvidently rushed into danger, but the peril was brought upon them without any fault or want of care on their side, and it was impossible, at that moment, to foresee whether it would be safer to remain in the carriage or to spring from it; they had nothing left to them but a choice of perils, and one of them must be encountered. Now, if a man unlawfully places another in a situation which compels him to undergo one of two hazards, and forces him to choose, upon the instant, between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted. There was, unquestionably, imminent danger in this case either way; sometimes, those who spring from the coach escape without injury, while the passengers who remain in it suffer severely; at other times, the result is different, and it proved to be so on this occasion; but this could not be foreseen at the moment, and the injury suffered by the plaintiff's wife was the immediate consequence of one of the two perils which the negligence of the defendants placed before her, and between which they compelled her to choose. If, therefore, the facts assumed on this point are found by the jury to be true, the defendants are responsible for the injury she sustained.

The last point made in the argument may be disposed of in a few words. It is very clear, that if the driver, without any fault on his part, or on that of the defendants, was so overcome by the extreme and unusual coldness of the weather, that he was unable to manage his horses, and perform his duty as driver, then the plaintiff is not entitled to recover; if there was no negligence, there can be no cause of action. The only doubt we feel on this part of the case is, whether there is evidence enough to authorize the defendants to ask for this instruction; but if there is the slightest evidence, conducing to prove the fact, the question must be left to the jury; and even if there be some doubt whether there is any competent and legal evi-

dence of the fact, the court would be unwilling to withdraw the question altogether from the jury, because it is to that tribunal that the law commits the decision upon controverted facts, and the court have no right to suppose that the jury would find a verdict upon slight and insufficient testimony, or without any testimony to warrant it.

Upon the whole case, therefore, as presented by the prayers made to the court, we give the following instructions to the jury:—

1. The defendants are not liable to this action, unless the jury find that the injury of which the plaintiff complains, was occasioned by the negligence, or want of proper skill and care in the driver of the carriage, in which she was a passenger; but the fact that the carriage was upset, and the plaintiff's wife injured, is *prima facie* evidence that there was carelessness or want of skill on the part of the driver, and throws upon the defendants, the burden of proving that the accident was not occasioned by his fault.

2. It being admitted that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendants to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged; and that he acted on this occasion, with reasonable skill, and the utmost caution and prudence; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence on his part, then the defendants are liable to this action.

3. If the jury find from the evidence, that there was no want of skill or care, or caution on the part of the driver, and that the coach was upset by the act of the plaintiff, or his wife, in rashly and imprudently springing from it, then the defendants are not liable to this action. But if the want of skill or care in the driver placed the passengers in a state of peril, and they, at that time, had reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, then the

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plaintiff is entitled to recover, although the jury may believe, that from the position in which the negligence of the driver had placed the carriage, the attempt of the plaintiff, or his wife, to escape, may have increased the peril, or even caused the carriage to upset; and although the jury may also find that the plaintiff and his wife would probably have sustained little or no injury, if they had remained in the stage.

4. If the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged, and the accident was occasioned by no fault, or want of skill or care on his part, or that of the defendants, but by physical disability in the driver, produced by exposure to extreme and unusual cold, which rendered him for the time incapable of doing his duty, then the defendants are not liable to this action.

*R. Johnson* and *J. V. L. McMahon*, for the plaintiff, cited, 2 Camp. 80, Story on Bailm. § 601; 11 Pick. 106; 12 Pick. 477; 1 Camp. 179; 2 Eng. C. L. Rep. 482; 5 Carr. & P. 409, 410; 23 Eng. C. L. Rep. 331; 2 Esp. Rep. 533; 3 Eng. C. L. Rep. 233.

*Wm. Schley* and *John Glenn*, for the defendants, cited, 1 Stark. Rep. 493; 2 Taunt. 314; 11 East 61; 2 Stark. Rep. 377; 5 Carr. & P. 375, 421; 6 Carr. & P. 23; 8 Carr. & P. 104, 373; 6 Cow. 191; 2 Pick. 621; 12 Pick. 477; 1 Camp. 169.

Affirmed by the Supreme Court in 13 Peters 181.

FRANCIS T. MONTELL

*vs.*

UNITED STATES.

The bond given to the United States, under the act of congress, passed 28th February 1803, sect. 1, by the master of a vessel bound to a foreign port, conditioned for the return of the crew to the United States, does not embrace the case of a vessel sold in a foreign port, and which does not return to the United States.

The bond does not extend to cases where the seaman is lawfully separated from the ship, or is separated from her without the fault of the master or owner.

It applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continue subject to the lawful authority of the master, and where it was in his power to bring them home.

Circuit Court, April Term, 1840. Error to the District Court.

This suit was instituted by the United States in the district court, on the 4th of November 1839, against Francis T. Montell, the plaintiff in error, and John B. Corner, on the following bond:—

“Know all men by these presents, that we, John B. Corner, of Baltimore in the state of Maryland, master or commander of the schooner called the *Elvira*, now lying in the district of Baltimore, and F. T. Montell, in the city of Baltimore, in the state of Maryland, are held and firmly bound unto the United States of America, in the full and just sum of four hundred dollars, money of the United States; to which payment well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 10th day of May, one thousand eight hundred and thirty-nine.

"Whereas, the above bounden John B. Corner hath delivered to the collector of the customs of the district of Baltimore, in the state of Maryland, a verified list containing, as far as he can ascertain them, the names, places of birth, residence and description of the persons who compose the company of the said schooner called the Elvira, now lying in the said district, of which he is at present master or commander, of which list the said collector has delivered to the said J. B. Corner a certified copy. Now the condition of the above obligation is such, that if the said John B. Corner shall exhibit the aforesaid certified copy of the said list, to the first boarding officer at the first port in the United States at which he shall arrive on his return thereto, and then and there also produce the persons named therein to the said boarding officer, *except any of the persons contained in the said list who may be discharged in a foreign country, with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing*, signified in writing under his hand, may arrive as aforesaid, with other persons composing the crew as aforesaid, and who may have died or absconded, or may have been forcibly impressed into other services, of which satisfactory proof shall be then also exhibited to the said last-mentioned collector, then and in such case, the said obligation shall be void and of no effect, otherwise it shall abide and remain in full force and virtue.

JOHN B. CORNER, [SEAL.]

FRANCIS T. MONTELL, [SEAL.]

Sealed and delivered in the presence of  
H. RING."

*1st Exception.*—The plaintiffs to support the issues on their part, offered in evidence the following bond (being the same above set forth), the due execution of which was admitted, and likewise offered in evidence the certified list of the crew of the schooner Elvira, sworn to by the mas-

ter of said schooner, on the 9th day of May 1839 (and embodied in said exception), and further proved by Hamilton Ring, that he is an officer in the custom-house at Baltimore, and has charge of the marine papers, such as reports, returns of registers, certificates of foreign consuls and commercial agents, and that no report of the master of the *Elvira*, in regard to the seamen mentioned in the certified list inserted in the exception, has been made to said custom-house; he further proved, *that since the clearing of the said schooner Elvira*, he has seen at Baltimore, John B. Corner, the master of said schooner, but that the return of said schooner has never been reported at the custom-house at Baltimore, nor does he know that said schooner has returned to any other port in the United States: whereupon, defendant, by his counsel, prayed the court to instruct the jury:—That the evidence offered by the United States in this case does not bring the defendant within the condition of the bond exhibited in evidence, and that the plaintiffs cannot, therefore, recover.

Which prayer was rejected; the court (HEATH, J.) believing a *prima facie* case was made out in proof; that the case was within the first section of the act of 1803; and that it was not necessary for the government to prove the negative, that the vessel was not sold. To this opinion, and the rejection of said prayer, the defendant, by his counsel, excepted.

*2d Exception.*—After the evidence offered by the plaintiffs, detailed in the first bill of exceptions on the part of the defendant, and which is to be considered as incorporated in this, the defendant's second bill of exceptions, the defendant offered in evidence the following consular certificate:—

Consulate of the United States of America: Havana.

I, John A. Smith, vice-consul of the United States of America, do hereby certify that John B. Corner, master of



## Montell v. United States.

the schooner Elvira, produced and discharged, according to law, the following persons, whose names are on the list of the crew, as citizens of the United States, to wit: Joel Pomeroy, Charles Smith, Oliver Greenleaf and James Mitchell. And the appearer having produced to me the contract with the seamen, it appeared that they had agreed to go the voyage from Baltimore, to receive, each, twenty-five dollars advance, and two dollars per month wages; on questioning them, they answered, it was their agreement.

In testimony whereof I hereunto set my hand and affix my seal of office, at Havana, this 28th day of May [SEAL.] A. D. 1839, and of the Independence of the United States the 63d. J. A. SMITH.

Which was admitted to be signed and sealed by the vice-consul of the United States, at Havana, and was presented to the collector of the port of Baltimore. It was stated and admitted that the crew of the schooner Elvira were discharged at Havana. Whereupon the district attorney moved the court for its opinion and direction to the jury, that the said certificate affords no defence to this action.

1. Because Patrick Poinsen was not accounted for.
2. Because it does not appear thereby that Rossiter B. Wade, whose name appears first on the crew list, heretofore given in evidence by the plaintiffs, and who was discharged in Havana, was discharged in the Havana with the consent of the consul or vice-consul, nor that extra wages had been paid to him, or on his account.

3. Because the contract for wages, as set forth in the said certificate, is contrary to the policy of the act of congress.

Which prayer the court granted, and instructed the jury, that Poinsen, being a foreigner, was not embraced by the law; that the name of the said Rossiter B. Wade, discharged in the Havana, ought to have been accounted for in the certificate of the discharge of the crew; that

the first section of the act of congress covered him, as one of the crew ; and that the failure to obtain the vice-consul's certificate of his discharge, was a failure to comply with the provisions of the law, and the defendant is liable on his bond. The court instructed the jury, upon the whole, that the evidence offered was no defence to this action.

Whereupon the defendant, by his counsel, called William Frick, the collector, and asked him whether he had not seen the said Wade in the city of Baltimore, and at the custom-house in said port, after his sailing in said vessel. To the competency of which testimony the district attorney objected, and the court sustained the objection, and rejected the testimony ; whereupon the defendant, by his counsel, prayed leave to except to said opinion, and directions of the court, and each of them.

The verdict and judgment of the district court being against him, the defendant sued out this writ of error.

TANEY, C. J. This case is brought here by a writ of error to the district court. The suit was brought by the United States against Montell, upon a bond taken under the act of congress of February 28, 1803 (2 Stat. 203), for the return of the crew of the steamer Elvira, of Baltimore.

The first section of this act directs that before a clearance be granted to any vessel bound on a foreign voyage, the master shall deliver to the collector a list of the ship's company, and the collector shall deliver to him a certified copy of the said list ; and that he shall enter into bond that he shall exhibit the said certified copy to the first boarding officer, at the first port of the United States at which he shall arrive on his return thereto, and at the same time produce the persons named therein to the boarding officer ; whose duty it is to examine the men, with such list, and report to the collector as mentioned in the said section.

The third section of the same act provides, that when-

ever a vessel belonging to an American citizen shall be sold in a foreign country, and her company discharged, or where a seaman is discharged, with his own consent, in a foreign country, the captain shall pay into the hands of the American consul, residing at the place of discharge, three months' wages, over and above the wages due such seaman, two-thirds of which shall be paid to the seaman, upon his engagement on board of any vessel, to return to the United States; the remaining third to be retained, to form a fund for the relief of destitute American seamen in foreign parts.

It is unnecessary to state in detail the contents of the different exceptions, which were taken in the district court. The judgment of that court was in favor of the United States for the penalty of the bond; and the point on which the case turned will be better understood, by stating the material facts, as they appear upon the whole record, without referring particularly to the different exceptions, in which they are inserted.

It appears from the record, that the schooner *Elvira*, an American vessel, owned in Baltimore, cleared from this port for Havana, in the island of Cuba, about the tenth of May 1839. Montell, a merchant of this city, was the owner of the vessel, and John B. Corner, of the same place, the master for the voyage. On the day the schooner sailed, Corner delivered to the collector the crew-list, as directed by the act of congress above mentioned, and received the certified copy on the same day; and at the same time, he entered into the bond prescribed by the first section of the act of congress; in this bond, Montell, the owner, who is the plaintiff in error, was the security. The *Elvira* never returned to this country. The master returned in another vessel, some time before this suit was brought; and at the trial in the district court, the certificate of the American consul was produced, showing the discharge of all the crew at Havana, except Rossiter B. Wade, who went out as mate of the vessel.

It has been insisted on the part of the United States, that there is sufficient evidence on the record to show that the *Elvira* was sold at Havana, and that the crew were there discharged; and the district attorney contends that the bond of the master is forfeited: first, because he did not exhibit the crew-list to the first officer of the customs, who boarded the vessel, in which he returned to the United States, and account to him for the crew; secondly, because it does not appear that the three months' wages of the mate, Rossiter B. Wade, was paid to the consul.

I doubt very much whether it sufficiently appears, as contended for by the district attorney, that the *Elvira* was sold at Havana. But the chief point in controversy is, whether the bond embraces the case of a vessel sold in a foreign port, and which does not return to the United States; and as this point has been argued, I shall treat the case as if that fact appeared in the record, in order to decide the question upon which both parties wish for the opinion of the court.

Assuming then that the vessel was sold, the case presented, is precisely the one provided for in the 3d section of the law above referred to. The American owner may, if he thinks proper, always sell his ship in a foreign port; and if he does sell, he may discharge the crew; and in such a case, it does not require the assent of the consul to justify the discharge. The captain is bound to pay into the hands of the consul, the three months' wages as before mentioned, and the seaman is entitled to two-thirds of it, as soon as he has engaged a passage in another vessel, to return to the United States; but the captain has no power to compel him to return; he has no longer any authority over him, when he is lawfully discharged; indeed, he has nothing to do with him; for even the two months' wages are not to be paid to the seaman by the captain, but by the American consul; and it is at the option of the seaman to return or not. It would be most unreasonable, in such

a case, to forfeit the captain's bond, if the seaman did not return; and it would require very plain words to satisfy the court that the legislature could have intended to make such a provision.

But it is very evident that the bond does not extend to cases where the seaman is lawfully separated from the ship; or separated from the ship without the fault of the master or owner. The bond applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continued subject to the lawful authority of the master, and where it was in his power to bring them home. The words of the first section apply only to cases of this description; they imply that the master is still in command of the vessel in which he returns, and that the seamen are on board, and subject to his authority. Thus, the provisions of this section imply, that the boarding officer will make known to him his official character, and will call on him to produce the crew-list, and to produce the men also; yet he cannot be called on to produce the crew, unless he is still in the exercise of authority over them, and exercises it in the vessel where he is himself found; for the boarding officer is required to examine the crew, with the crew-list produced; everything required to be done, presupposes the captain to have returned in command of the same vessel in which he sailed. And even if the vessel returns without the seaman, he is not liable to the penalty of the bond, under the provisions of the first section, provided the seaman was discharged with the consent of the consul; nor is he answerable, where he dies or absconds, or is forcibly impressed in another service. Now, if the bond is not forfeited, where the seaman is discharged, with the consent of the consul, how can it be considered as forfeited, where the seaman is lawfully discharged, upon the sale of the vessel, without the consul's consent? The two cases are in principle the same, and they are both expressly placed on the same footing in the third section, and the

same provision is there made for each of these classes of cases.

But it seems to be supposed that the bond is forfeited, even where the seamen are lawfully discharged, unless the three months' wages are paid to the consul. The court think otherwise: the cases where seamen may be lawfully discharged, are provided for in the third section, and there is no reference in that section to the bond directed to be given by the master. The condition of the bond is prescribed in the first section, and it certainly can embrace no cases, beyond those enumerated in the law; and the payment of the three months' wages, where the vessel is sold, or where the seaman is discharged with the consul's consent, is not mentioned in the condition of the bond, as directed in the act of congress, and consequently is not intended to be secured by it.

The two sections of the law, before mentioned, apply to different cases; the first provides for the cases where the vessel returns to the United States; the third provides for cases where she is sold abroad. They are both intended to guard the seamen, who are always friendless and unprotected, in foreign ports, from the injustice and despotism of the captain; and also to preserve them, as far as possible, for the service of our own marine. Therefore, when the vessel returns, the captain is compelled to bring home his crew with him, unless he can show that they were separated from the ship, in some one of the modes pointed out in the first section; and the bond is intended to accomplish this object; but it was not the policy of the United States to prevent our ship-owners from selling their vessels in foreign ports; and it would have been a virtual prohibition of sale, if they had been compelled, notwithstanding a sale, to bring home the crew. The third section, therefore, provided for the cases of sales in foreign ports, and instead of compelling the captain to bring home the crew, it compels him to furnish the consul with the means of

*Montell v. United States.*

sending them home, if they are willing to come, and tempts them to return by refusing them the money, until they have engaged a passage to the United States. But the bond prescribed in the first section, was not intended to cover the cases mentioned in the third; there is nothing, in any part of the law, from which such an intention can be inferred.

If, therefore, the vessel was sold abroad, the bond in question does not apply to the case; no suit can be maintained on it, unless the *Elvira* has returned to the United States. It is admitted that she has not returned. The United States, therefore, can have no cause of action on the bond; and it is unnecessary to inquire whether Rositer B. Wade was or was not discharged, or was or was not paid his three months' wages; because there can be no breach of the condition of the bond, and, consequently, no cause of action upon it, if the *Elvira* has not returned to the United States.

Some other questions were argued at the bar; but it is unnecessary to express an opinion upon them, as the points, above decided, dispose of the case. The judgment of the district court is, therefore, reversed.

*St. George W. Teackle* and *John Nelson*, for plaintiff in error.

*Nathaniel Williams*, for defendants in error.

## UNITED STATES

*vs.*

## LORENZO DOW.

In capital cases, the prisoner is entitled to a copy of the indictment, and a list of the jury, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before his arraignment.

Under the act of congress of 30 April 1790, ch. 36, sect. 28, the arraignment is to be regarded as the commencement of the trial; and the two entire days must be exclusive of the day of delivery of the copy of the indictment and list of jurors, and the day of the arraignment.

In offences made capital by the act of congress of 30 April 1790, the prisoner may challenge twenty jurors peremptorily; in treason, thirty-five. In indictments for capital offences, under that act, the prisoner may challenge twenty jurors peremptorily, and no more; in offences made capital since that act, he is entitled to thirty-five peremptory challenges, according to the rules of the common law.

The act of congress, passed September 24, 1789, ch. 20, sect. 29, in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be summoned. The circuit courts are bound to follow the laws of the respective states in which they are held, in the mode of forming the juries, and in determining upon their qualifications; but the laws of the several states do not regulate the courts of the United States in the number to be summoned; upon this subject, they are governed by the rules of the common law.

The prisoner was indicted for the murder of the captain of the brig Francis, on the high seas; the brig was an American vessel, and the prisoner one of the mariners on board; he belonged to the Malay race, and was baptized and educated in the Christian religion; the witnesses on the part of the United States were two free negroes and one free mulatto. On objection being made to the admissibility of the evidence of one of these negroes, held, that the question was to be determined by the laws of Maryland.

That upon general principles, there was nothing in the case of the witness, or in his color, that would make him incompetent to give testimony in any case.

That the result of the legislation of Maryland on this subject, is, that negroes and mulattoes, free or slave, are not competent witnesses in any case wherein a Christian white person is concerned; but they are competent witnesses against all other persons.

That the prisoner could not be regarded as a Christian white person, and therefore the testimony was admissible against him.



## United States v. Dow.

An indictment which states that the prisoner, "late of the district of Maryland, mariner, on the 31st day of October 1839, *then and there*, being on board a certain brig, called, &c., *on the high seas, on the Atlantic Ocean, in latitude 33°*, out of the jurisdiction of any particular state, and within the jurisdiction of the United States," \* \* "did, *then and there*, commit," &c., is bad for repugnancy; and no judgment will be rendered thereon.

The words *then and there*, mean "at the time and place aforesaid," and in this case refer as to *time*, to the 31st day of October 1839, and as to the *place*, to the district of Maryland; and this allegation (which is a substantive one) is repugnant to the subsequent allegation, that the offence was committed on the high seas, "*out of the jurisdiction of any particular state.*"

The court cannot reject any material allegation in an indictment or information, which is sensible and consistent in the place where it occurs, and is not repugnant to any *antecedent* matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected.

## Circuit Court, April Term, 1840. Indictment.

The facts of this case are sufficiently stated in the opinion of the court, delivered by

TANEY, C. J. Lorenzo Dow was indicted for the murder of the captain of the brig Francis, on the high seas; the brig being an American vessel, and Lorenzo Dow one of the mariners on board. He was indicted under the act of congress of April 30, 1790, ch. 36, sect. 8.

At the trial of the case, the following points were ruled by the court, before the jury were sworn:

1. That the prisoner was entitled to a copy of the indictment, and a list of the jury, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before his arraignment. That, under the act of April 30, 1790, ch. 36, sect. 28, the arraignment was to be regarded as the commencement of the trial; and the two entire days must be exclusive of the day of delivery of the copy of the indictment and list of jurors, and the day of the arraignment. (Foster's Crown Law 230; 4 Bl. Com. 351.)

2. In offences made capital by the act of April 30, 1790, the party may challenge twenty jurors peremptorily; in treason thirty-five (see sect. 29); and the prisoner being indicted under this law, he was entitled to challenge twenty peremptorily, and no more. In offences made capital since the act of 1790, the party is entitled to thirty-five peremptory challenges, according to the rules of the common law. (*United States v. Johns*, 4 Dall. 412; *United States v. Johns*, 1 Wash. Circuit Court Rep. 363.)

3. The act of congress of September 24, 1789, ch. 20, sect. 29, in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be summoned. The circuit courts are bound to follow the laws of the respective states in which they are held, in the mode of forming the juries, and in determining upon their qualifications; but the laws of the states do not regulate the courts of the United States in the number to be summoned; upon this subject, the courts of the United States are governed by the rules of the common law. (*United States v. Insurgents*, 2 Dall. 335, 341; *United States v. Fries*, 3 Dall. 515.)

In this case, the court directed the marshal to summon as many, in addition to those attending on the regular panel for the term, as would make up the number of thirty-six; and that the list of these thirty-six jurors should be delivered to the prisoner, two entire days before his arraignment.

The jury were sworn, and the trial proceeded. It appeared from the admissions on both sides, that the prisoner was a native of the town of Manilla, in one of the Philippine Islands; that his parents were both Malays, living in that town, and subjects of the queen of Spain; that they were Christians, and that the prisoner was baptized and educated in the Christian religion, and had always professed to be a Christian.

At the time of the murder, the captain was the only white person on board; the crew consisted of the Malay, three negroes, and one mulatto; two of the negroes were natives

of Philadelphia, and one a native of the state of Delaware; the mulatto was a native of the British province of Nova Scotia; they were all free.

The first witness produced on behalf of the United States was one of these negroes. He was objected to by the counsel for the prisoner, upon the ground, that by the laws of Maryland, a free negro was not a competent witness in any case against the prisoner; or, at all events, not in a capital case.

In deciding upon the admissibility of this evidence, the court must be governed by the laws of Maryland, under the act of congress of 1789, ch. 20, sect. 34, which provides, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law." It will be necessary, therefore, to review the different acts of assembly, which have been passed by the state upon this subject; for, if the testimony offered is not admissible, it must be on the ground that it is excluded by some statute of the state. Upon general principles, there is certainly nothing in the case of the witness, or in his color, that would make him incompetent to give testimony in any case.

The first act of assembly upon this subject is that of May session 1717, ch. 13. The second section of that law provides, that "no negro or mulatto slave, free negro, or mulatto born of a white woman, during the time of his servitude by law, or any Indian slave, or free Indian, native of this or the neighboring provinces, be admitted or received as good and valid evidence in law, in any matter or thing whatsoever, depending before any court of record, or before any magistrate, within this province, *wherein any Christian white person is concerned.*" And the third section of this law makes the several persons excluded by the second section, witnesses *against* each other, where other sufficient evidence is wanting, "provided such evidence or testimony

do not extend to the depriving of them, or any of them, of life or member."

It will be observed, that this act of assembly disqualifies the persons mentioned in it from giving testimony, in any case *wherein a Christian white person is concerned*; but permits them to be examined, in the discretion of the judge, against one another, in cases not extending to life or member. This qualified admission of their testimony *against* each other, was always held to be an implied exclusion of it *in favor* of one another; and this produced the act of assembly of 1801, ch. 109, which permitted them to give testimony *for*, as well as *against*, each other, in prosecutions for stealing goods, or for receiving them knowing to be stolen.

The act of 1808, ch. 81, was the next in order, and made them witnesses in all criminal prosecutions, for and against one another. In this act, as well as in the act of 1801, before mentioned, "*Indian slaves*," and "*free Indian natives*," are not mentioned, because before the passage of these laws, that unfortunate race had disappeared from the state. And it is also proper to remark, that in the act of 1808, the expression used in the act of 1717, of "*mulatto born of a white woman, during the time of his servitude by law*," is altogether dropped, and the persons authorized to give testimony are, "*any negro or mulatto slave, or any mulatto descended of a white woman, or any negro or mulatto free or freed*;" and the persons for or against whom it may be given, in any criminal prosecution, are described in precisely the same words. The acts of assembly that subjected a mulatto, born of a white woman, to a certain period of servitude, were not in force when the law of 1808 was passed; they were repealed by the act of 1790, and again in 1796, ch. 67, sect. 14.

The result of these various acts of legislation is this: negroes and mulattoes, free or slave, are not competent witnesses, in any case wherein a Christian white person is concerned; but they are competent witnesses against all

other persons. It is true, that the act of 1808 does not, in so many words, say that negroes and mulattoes shall be competent witnesses in all cases except those wherein a Christian white person is concerned; the language of the statute merely enables them to give testimony in the cases there specified. These were cases in which, among others, negroes and mulattoes had been made incompetent witnesses by the act of 1717; and the effect of the act of 1808 was to repeal so much of this law. And as negroes and mulattoes, as well as persons of any other description, were competent witnesses upon the general principles of the common law, and as they had been disabled merely by the prohibitory provisions of the act of 1717; they are now competent witnesses in all cases, where the provisions of that statute are no longer in force; and the only disabling clause of that statute still in force, is the one which makes them incompetent where any Christian white person is concerned; the other disabling clauses have all been repealed.

We do not speak of the clauses in relation to Indian slaves, or native Indians; the silence of the laws of 1801 and 1808, in relation to this class of persons, has already been accounted for. The prisoner, however, is not an "*Indian slave, or a free Indian native of this or any of the neighboring provinces*;" and if the provisions of the act of 1717, in relation to persons of that description, be regarded as still in force; and if negroes or mulattoes would be incompetent witnesses against them, in cases affecting life or member, yet the prohibition does not reach the case of the prisoner.

The only question is, whether he is to be regarded as a Christian white person? We think he is not; the Malays have never been ranked by any writer among the white races. But the act of 1717, which excludes the testimony of negroes and mulattoes, in cases where Christian white persons are concerned, did not look to the differences, moral or physical, which have been supposed to exist

between the different races of mankind; the law was made for practical purposes, and grew out of the political and social condition of the colony. The colonists were all of the white race, and all professed the Christian religion; from the situation of the world at that time, no persons but white men professing the Christian religion could be expected to emigrate to Maryland; and if any person of a different color, or professing a different religion, had come into the colony, he would not, at that time, have been recognized as an equal by the colonists, or deemed worthy of participating with them in the privileges of this community. The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.

The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter. Christian white men could not be reduced to slavery, or held as slaves in the colony; but they might, according to the laws of the colony, lawfully hold in slavery negroes or mulattoes, or Indians. The white race did not admit individuals of either of the other races to political or social equality; they were regarded and treated as inferiors, of whom it was lawful, under certain circumstances, to make slaves. These three races existing in the same territory, one possessing all the power, and holding the other two in a state of subjection and degradation, it was natural, that feelings should be created by such a state of things, that would make it dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded; hence free negroes and mulattoes, and free Indians of this or the neighboring provinces, as well as those who were held in slavery, were disqualified from being witnesses against Christian white men. No one who

belonged to either of the races of which slaves could be made, was allowed to be a witness where any one was concerned who belonged to the race of which the masters were composed.

In order, therefore, to make the negroes and the mulatto incompetent witnesses in this case, it must be shown that the prisoner belonged to the white race, that is to say, to that race of men who settled the colony of Maryland, and formed its political community, at the time the act of 1717 was passed. But it is admitted, that he is a Malay; and the Malays are not white men, and have never been classed with the white race. In Maryland, they were certainly regarded as belonging to one of those races of whom it was lawful to make slaves, and who, according to the laws of England and of the colony, were legitimate objects of the slave trade. This appears by the following case. By the act of assembly of Maryland of 1715, ch. 44, sect. 22, it is declared, "that all negroes and other slaves already imported, or hereafter to be imported into this province, and all the children now born, or hereafter to be born of such negroes and slaves, shall be slaves during their natural lives." It became a question, under this act, whether the descendant of a woman who was imported as a slave from Madagascar, could be held in slavery in Maryland. (3 H. & McHen. 501.) This case is not fully stated in the report; I have examined the original papers. It was proved that the mother of the petitioner was a yellow woman with straight black hair, and that she was not of the negro race, and the testimony shows that it was upon this fact that the petitioner chiefly relied; she was undoubtedly a Malay, according to the description in the evidence. The court said that as Madagascar was a country where the slave trade is practised, the petitioner must show that her ancestor was free in her own country, in order to entitle her to freedom here. Now, it is well known that the Malay race form a part of the population of Madagascar; (1 Maltebrun's Geography 192, 586; 2 Murray's Geography

525; McCullogh's Com. Dict. 786; Wyatt's Nat. Hist. 22, 23; Ives' Voyage 5; 2 Raynal's East and West Indies 227;) and consequently, under this decision, may be held in slavery in this state, if they were slaves in their own country, and when imported here as slaves, they are presumed to have been slaves in their own country, till the contrary appears.

It follows, from this decision, that Malays might lawfully be held in slavery in the colony of Maryland, and consequently, are not embraced by the description of white men as mentioned in the act of 1717, and the testimony offered is not excluded by that law. The case before the court, therefore, stands upon the general principles of the common law, and the witnesses offered by the United States are competent witnesses.

It may be proper to say a few words in relation to the cases embraced by the third section of the act of 1717. By that section negroes, mulattoes and Indians were not witnesses against one another, in cases which might affect life or member. The policy of this section obviously stood upon very different principles from that which dictated the total exclusion of their testimony against white persons. It arose from the barbarous and brutal ignorance of the two excluded classes, and their crude and monstrous superstitions, which rendered them incapable of feeling or appreciating the obligation of an oath, as felt and appreciated in a Christian community; and it was not, therefore, deemed safe to receive them as witnesses, even against one another, in the more serious or grave offences, lest they should avail themselves of the privilege in order to obtain revenge for real or supposed injuries. Even the limited extent to which they might be heard was discretionary with the judge, and he might, if he deemed it proper to do so, refuse to hear them; and if he heard them at all, it must be against one another; they could in no case whatever be received as witnesses *in behalf* of each other.

In process of time, however, when the Indians had dis-



appeared from the state, and the negro and mulatto population had become instructed in the doctrines of the Christian religion, and made aware of the sanctity and obligation of an oath, the reason which had excluded them as witnesses, even in cases where individuals of their own class were concerned, no longer existed; and the act of 1808, therefore, made them competent in all cases for and against one another. In other words, it made them competent in all cases in which they had been disabled by the act of 1717, except in the case where white persons or Indians were concerned; in the case of white persons, the reasons of policy which dictated the exclusion remained unchanged; and in the case of the Indians, the law had no longer any practical operation, as there were no Indians, free or slave, remaining within the borders of the state.

If the third section of the act of 1717 was still in force, we must have regarded it as an implied declaration that negroes or mulattoes, free or slave, were incompetent witnesses, in any case where life or member was at stake, and upon that principle have rejected the testimony now offered on behalf of the United States. But the act of 1808 having restored their competency in all cases except those above mentioned, and the case of the prisoner not being within either of those exceptions, the question must be determined upon common law principles, and the testimony of these witnesses must, therefore, be admitted.

The testimony was accordingly given to the jury, who found the prisoner guilty of murder.

A motion in arrest of judgment was made by the prisoner's counsel, and, after full argument, the court gave the following opinion, arresting the judgment.

TANEY, C. J. The objection taken to the indictment, upon the motion in arrest of judgment, is, that it contains averments repugnant to one another, in relation to the place

where the offence was committed. The first count in the indictment states that "Lorenzo Dow, late of the District of Maryland, mariner, on the 31st day of October 1839, *then and there*, being on board a certain brig called the Francis, belonging to a citizen of the United States, on the high seas, on the Atlantic ocean, in latitude thirty-three," out of the jurisdiction of any particular state, and within the jurisdiction of the United States, did, then and there, commit the crime charged in the indictment. The objection is, that the word "there," first above mentioned, refers to the District of Maryland; that it is an allegation that the crime was committed within that district, and consequently, that this allegation is repugnant to the subsequent averment, in the same sentence, that it was committed "out of the jurisdiction of any particular state."

We have carefully examined the precedents, and we are satisfied that the words "then and there," as first above introduced, are not to be found in indictments in analogous cases, in any book of approved authority. The words "then and there," which so frequently occur in indictments, mean nothing more than the words "*at the time and place aforesaid*;" they necessarily imply that a certain time and a certain place have been before mentioned, to which they relate; and if no time and place have been before mentioned, the words *then and there* must be insensible and without meaning.

In the case under consideration, the District of Maryland is the only place, and the 31st of October 1839, the only time mentioned in the indictment, before the words "*then and there*," which are now in question. If, instead of using these words, the indictment had said, that "at the time and place aforesaid," Lorenzo Dow, on board the brig Francis, committed the murder, there would be no doubt that the place referred to, was the District of Maryland; because it is the only place before mentioned in the indictment. We have already said that the words "*then and there*" mean the

same thing with the words "at the time and place aforesaid;" this clause in the indictment is, therefore, a plain averment that at the date before mentioned, and at the District of Maryland, Lorenzo Dow, on board the brig Francis, committed the crime of which he has been found guilty. But this averment is repugnant to the allegation in the same clause of the indictment, which states that, at the time therein mentioned, he committed the crime on board the brig Francis, "out of the jurisdiction of any particular state;" for if the place at which he committed the murder was out of the jurisdiction of any particular state, it could not be at the District of Maryland.

It has been argued, in support of the indictment, that these words "then and there," which are manifestly out of place, may be regarded as surplusage. But the rule upon this subject is very clearly stated in the case of *The King v. Stevens*, 5 East 244, where *Ld. Ellenborough* says, "I do not find any authority in the law which warrants us in rejecting any material allegation in an indictment or information, which is sensible and consistent in the place where it occurs, and is not repugnant to any *antecedent* matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected."

The rule of law here stated, undoubtedly is the true one, and it must decide the case before us. For here, the averment in question, relating to the place at which the crime was committed, is a material one, because we have no jurisdiction if this averment is true; it is sensible and consistent where it occurs, because such a crime might have been committed on board the brig Francis, within the District of Maryland; it is clearly not repugnant to any antecedent matter; but it is repugnant to the subsequent allegation, that the crime was committed out of the jurisdiction of any particular state; and this latter averment cannot be rejected,

because the jurisdiction of this court to try and punish the offender depends upon it. We have no jurisdiction unless the offence was committed out of the jurisdiction of any particular state. The allegations as to place are therefore both material; they are repugnant to one another; and as neither can be rejected, the indictment is fatally defective.

If we were at liberty to look into the evidence given upon the trial, the objection to the indictment might easily be disposed of; for the brig Francis does not appear to have been at any time within the District of Maryland, and all the evidence states that the act for which the prisoner is indicted was done on the high seas, as charged in the latter averment. But the court are not at liberty to look beyond the indictment itself. He has been found guilty of the crime charged in that indictment—according to one allegation, that crime was committed in the District of Maryland; according to another, it was committed out of the jurisdiction of any particular state. In the first case, we have no jurisdiction; in the latter, we have; but we have no right to go out of the indictment, and inquire which of these conflicting allegations contains the truth.

The rules of law applicable to indictments, are undoubtedly in many instances technical and nice; but they have been long and well established, and no court has a right to disregard them, even in the case of the humblest individual, or the most guilty offender.

The case before us, however, is rather matter of substance than one of technical form. Certainly, a court ought not to be permitted to inflict punishment, unless the offence is first found by the jury. The verdict of guilty finds the precise offence charged in the indictment, and none other; and, unless the indictment clearly shows that it was committed within the jurisdiction of the court, the principles of justice, as well as the principles of law, forbid the court to proceed to judgment.

We have spoken, so far, of the first count in the indict-

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ment; the same defect is found in the remaining three counts. The judgment must therefore be arrested.

The prisoner was re-indicted and tried, and found guilty. Sentence of death was passed upon him, but he was subsequently pardoned by the President of the United States.

*N. Williams*, District Attorney, for the United States.

*Z. Collins Lee* and *S. Teackle Wallis*, for the prisoner.

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IN THE CASE OF THE UNITED STATES

*vs.*

FRANCIS T. MONTELL.

The act of congress of 31 December 1792, ch. 45, sect. 7, provides in effect, that previous to any registry of a ship or vessel, the ship's husband, or acting and managing owner, together with the master thereof, and one or more sureties, shall become bound to the United States in a certain sum (according to the size of the vessel) that such registry shall be solely used for the vessel for which it is granted, and shall not be sold, lent or otherwise disposed of, to any person or persons whatsoever; and if the vessel be lost, or shall, by other disaster, be prevented from returning to the port, and the registry be preserved; or if the vessel be sold, in whole or in part, to a foreigner, that the register in such cases shall be delivered up to the collector, within certain times specified in the act. The 29th section of the same law declares that all the penalties and forfeitures incurred for offences against that act may be sued for and recovered in such courts, and be disposed of in such manner, as penalties and forfeitures which may be incurred for offences against the act of 4 August 1790, ch. 62; and by this last-mentioned act, one moiety of all penalties, fines and forfeitures (not otherwise appropriated) are to be divided in equal portions between the collector, naval officer and surveyor. Judgment was recovered in the district court, on a bond given under the above-mentioned act, and a petition was filed by the collector, claiming one moiety of the sum recovered for himself and the naval officer and surveyor, on the ground that it was a penalty or forfeiture for an offence against the act of congress.

*Held*, that the sum secured by a bond given under that act, is a penalty or forfeiture inflicted by the sovereign power for a breach of its laws, and is to be distributed in the mode provided for such penalties and forfeitures by the 29th section. It is not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offence; and it is not the less a penalty and a punishment, because security is taken before the offence is committed, in order to secure the payment of the fine, if the law should be violated.

Circuit Court, April Term, 1841. Appeal.

This was an appeal from the district court; the facts are fully stated in the opinion delivered by

TANEY, J. C. This is an appeal from the decree of the district court, and the point in dispute will be better understood by stating, in the first instance, the provisions of the acts of congress upon which it depends.

The act of December 31, 1792, ch. 45, sect. 7, entitled "An act concerning the registering and recording of ships or vessels," provides, that previous to any registry of a ship or vessel, the ship's husband, or acting and managing owner, together with the master thereof, and one or more sureties, shall become bound to the United States in a certain sum (according to the size of the vessel), that such registry shall be solely used for the vessel for which it is granted, and shall not be sold, lent or otherwise disposed of, to any person or persons whatsoever; and if the vessel be lost, or shall by other disaster be prevented from returning to the port, and the registry be preserved; or if the vessel be sold, in whole or in part, to a foreigner, that the register in such cases shall be delivered up to the collector, within certain times specified in the act of congress. I do not give the words of the section, nor detail all of its particular provisions on this subject; I merely state enough to explain its object and intention. Its main object is to secure the return of the register, and to preserve it from improper use; and for that purpose, it requires both the master and the ship's

husband, or acting and managing owner to become bound in the sums mentioned in the law.

The 29th section of the same law declares, that all the penalties and forfeitures incurred by offences against that act, may be sued for, prosecuted and recovered, in such courts, and be disposed of, in such manner, as penalties and forfeitures which may be incurred for offences against the act of 4 August 1790, ch. 62; and by this last-mentioned act, one moiety of all penalties, fines and forfeitures (not otherwise appropriated) are to be divided in equal portions between the collector, naval officer and surveyor.

The case now before the court arises upon the foregoing sections of these two acts of congress. Francis T. Montell, the owner, became bound with John B. Corner, the master, and James E. Montell, their surety, for the return of the register of the *Elvira*, in the sum of \$1200. The register was not returned according to law; whereupon suit was brought on the bond, and a judgment recovered against the two Montells, in the district court, and the money paid into court, where it still remains under the agreement filed. The collector thereupon filed his petition in the district court, praying that a moiety of the sum recovered should be paid to him and the two other officers before mentioned; and the question presented by his petition is this:—Is the sum recovered upon the bond of Montell a penalty or forfeiture recovered for an offence against the act of congress? If it is, then the officers above mentioned are entitled to the moiety they claim. The district court was of opinion that the sum recovered was not a penalty or forfeiture for an offence against the act of congress, and therefore dismissed the petition; and from this decision the collector has appealed to this court.

The question is one of some difficulty. Penalties and forfeitures imposed by statute are not usually provided for by bond and security given in advance. The sum recovered from Montell is recovered upon a contract; the action was brought upon a contract; and was not and could not have

been brought in any of those forms which are usually necessary for the recovery of fines or forfeitures imposed by law. Yet this sum was, in truth, forfeited by Montell, by reason of his violation of a duty imposed by the act of congress; it was a specific penalty upon the owner and master, for the commission of a particular offence against the policy of that law. And although the amount was secured by bond given for the performance of the duty, yet this duty was a part of the same policy with other duties mentioned in the act, and for which other penalties are inflicted; a moiety of which last-mentioned penalties, it is admitted, go to the collector, naval officer and surveyor.

Thus, for example, the eleventh section of the act authorizes a citizen who purchases a vessel out of the district where he resides (in which all vessels owned by him ought to be registered), to register the vessel in the district in which she may be; and the section requires the certificate of registry to be delivered up to the collector, upon the arrival of the vessel within the district to which she legally belongs; and if it is not so delivered, the owner or owners, and the master, severally forfeit one hundred dollars.

So too, in section twelve, a vessel purchased by an agent for a citizen of the United States, in a district more than fifty miles distant from the one to which she would legally belong, after such purchase, is entitled to be registered in the district where she may be at the time of the purchase, and the certificate of registry is required to be delivered up to the collector, upon her arrival in her own proper district, and the master, and owner or owners, severally forfeit one hundred dollars, if it is not so delivered.

So again, in section thirteen, a mode is pointed out by which a master, having lost or mislaid the register of his vessel, may obtain a new one, in a district to which his vessel does not belong, and where, therefore, she is not entitled regularly to be registered; but he is required to



deliver it up to the collector of the port to which the vessel belongs, within ten days after her arrival in the district, and if he fails to do so, he forfeits one hundred dollars.

So also, in section fourteen, when a vessel is sold to another citizen of the United States, or she is altered or built upon in the manner mentioned in the law, her former certificate of registry is required to be delivered up, and the vessel to be registered anew; and if the former one is not delivered up, the owners forfeit five hundred dollars.

Now, as respects the forfeitures and penalties mentioned in these four sections, the one moiety is, unquestionably, given to the collector, naval officer and surveyor; and it is not easy to imagine that the penalty, secured by bond, in the seventh section, was to be disposed of in a different manner. All of these sections, including the seventh, require the return of the certificate of registry, in cases where the vessel to which it was granted is lost, or can no longer lawfully use it, and all of them inflict penalties for not returning it as required by law. In this respect the penalty under the seventh section is, in principle and policy, the same with the penalties imposed by the other sections; and the only difference between them is, that in this section security is given for the amount, and a contract made to pay it, in case the offence shall be committed. But is it less a penalty on that account?

It certainly is not to be regarded as a bond with a collateral condition, in which the jury are to assess the damages which the United States shall prove that they have sustained; for, according to that construction, the amount of damages would not depend upon the amount of the penalty prescribed in the section, which is graduated according to the size of the vessel, but would depend upon the discretion of different juries, and larger damages might be given where the penalty was only four hundred dollars, than in a case where the penalty was two thousand. This, obviously, is not the intention of the law; and the United States are entitled to recover the whole sum, for which the

party is bound, if any one of the conditions are broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? What do they lose? It would be difficult, I think, by any course of proof, or any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties.

The sum, for which the parties are to become bound, is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence. And it is not the less a penalty and a punishment, because security is taken before the offence is committed, in order to secure the payment of the fine if the law should be violated.

This view of the subject is strengthened by the provision in the act which requires that the managing owner, and the master of the vessel, shall both be parties to the bond. The object of this regulation is obvious. They are the persons who have the custody and control of the certificate of registry, and are therefore the proper objects of punishment, if it is not delivered up according to law; they are required to be parties, in order that the penalty, the punishment for the offence, may be imposed upon them. If this is not the object, if the design is merely to secure the United States against damages, liquidated or unliquidated, it would not matter who were bound in the bond, provided they were able to pay; any other obligors, with sufficient sureties, would be as available to the United States for damages, liquidated or unliquidated, as the owner and master of the vessel; yet, no bond, however well secured, can be received under this section, unless both the owner and master are parties. It is not damages, therefore, that are intended to be secured, but punishment

intended to be inflicted upon those who are justly and properly responsible for any improper use of the vessel's register; and if the offence is committed, and the sum is secured for which they are bound, it is the recovery of a penalty imposed by the act of congress.

It is, moreover, worthy of remark, that the penalties imposed in the 11th and 12th sections, for not delivering up the certificate of registry, are, like those in the 7th section, imposed upon both the master and the owner; and this would appear to be done, because, in the cases provided for in these two sections, as well as those mentioned in the 7th, the certificate would, at different times, necessarily, according to the ordinary course of business, be in the custody of each of them; and the reason for not requiring bond with surety, in the cases mentioned in the 11th and 12th sections, would seem to be, that the registry is obtained in a district where the owner does not reside, and where, therefore, he might find it difficult to procure the security. But the penalty is inflicted upon the same description of persons, and for the same purposes, as that directed to be secured in the 7th section; and I perceive nothing in the act from which it can be inferred that they are to be disposed of differently, when they are recovered from the offending party. The words of the act evidently include them; it declares "that all the *penalties and forfeitures* which may be incurred for offences against that act," shall be distributed in the manner hereinbefore mentioned. The money now in question is, undoubtedly, a *penalty*, and has been recovered as such for the offence against that act; and when the words of the law so plainly embrace the case, and its general scope and policy lead to the same conclusion, the form in which the penalty is secured is not, of itself, sufficient to authorize the court to restrain the meaning of the act of congress within narrower limits than its words import.

I am not aware that there has been any decision upon the point now before me, in any of the other circuits of

the United States. The reasoning, however, of the court in the case of the United States v. Hatch, 1 Paine's Reports 336, corroborates the opinion I have expressed. That was a suit upon a bond for four hundred dollars, conditioned for the return of the ship's crew, as prescribed by the act of 20 February 1803, ch. 62, sect. 1, and which, *mutatis mutandis*, is the same in form and in principle with the one I am now considering. The question in that case was, whether damages were to be assessed by the jury, or the whole penalty recovered as liquidated damages. Mr. Justice Thompson, in delivering the opinion of the court, remarks, on page 346, that he considers the construction of that act "the same as if it had expressly declared that, if the master did not comply with the duties therein required, he should forfeit the sum of four hundred dollars; and the reason why a bond is to be given, is, that security is required, and there must be some way in which the surety shall signify his assent to the undertaking." This reasoning is perfectly just, and applies equally to the case before me. It is the only ground upon which it can be maintained, that the whole penalty is absolutely forfeited by a breach of any one of the conditions.

It is true, that in the case above quoted, the sum for which the parties are bound is treated as liquidated damages, in the argument at the bar, and in the opinion of the court. The distinction is not there noticed between liquidated damages for the violation of a contract, by reason of which one party was damnified, and a fixed penalty imposed, by way of forfeiture, by the sovereign authority, for a breach of the law; and the construction given to the act of 1803, as above stated, which considers the penalty as a forfeiture for an offence, is hardly consistent with the notion that it is also to be regarded as liquidated damages; but the attention of the court was not drawn to this distinction, and the case before them did not require it.

Assuming the rule of construction, in relation to the act

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of 1803, to be the one above mentioned, and applying it to the act now in question, by the same rule it will follow, that the sum recovered on the bond in this case, is to be considered as a forfeiture for an offence. In other words, it is a fixed penalty, imposed by law as a punishment for a breach of duty enjoined by law, and must be treated as such, in the appropriation to be made of it under the act of congress.

The decree of the district court must, therefore, be reversed, and one moiety of the sum recovered be equally divided between the collector, naval officer and surveyor.

*Wm. F. Frick*, for petitioner.

*N. Williams*, District Attorney, for the United States.

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JEREMIAH T. NAYLOR AND OTHERS,

*vs.*

THOMAS BALTZELL AND PHILIP BALTZELL.

The ancient common law in relation to carriers is, undoubtedly, in force in Maryland, but there is no principle of jurisprudence upon which the court can expound a contract by the laws of that state, if it was not made there, nor was any part of it to be performed there.

The law of the domicile of the party does not govern the contract, nor determine his rights or obligation; they depend upon the law of the place where it was made, or where it was to be executed.

The master has a right to contract for the employment of the vessel, under circumstances of necessity, and the owners will be bound by it; but this right is derived from the maritime code, which is founded on the general usages and convenience of trade, and which has been adopted, to a certain extent, by all commercial nations.

The bill of lading is an instrument founded in the usages of trade, and not connected with any of the peculiar doctrines of the common law.

Where a vessel is injured by dangers of the seas, and is obliged to seek a port of distress, where she is found to be unable to proceed on her voyage, and the cargo is landed, the master becomes the agent of the cargo as well as the ship, and in that character, it is his duty to deal with the cargo, as a

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prudent and discreet owner would have done, if he had been on the spot at the time. He may transship it, and earn freight for his owners. If his own ship can be repaired in a reasonable time, he has a right to retain it until his own ship is ready, and, if necessary, may sell a part of the cargo, or hypothecate the whole, in order to obtain money for the necessary expenses of repairs; or he may abandon the voyage, and notify the owners of the cargo, of the disaster, and await their orders as to its future disposition.

As to the ship, the master may, in a foreign port, contract for repairs and supplies, and thereby bind the owners *to the value of the ship and freight*; or he may hypothecate *the ship and freight*, and thereby create a direct lien upon them for the security.

The authority of the master is limited to objects connected with the voyage, and if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities: and it is incumbent on the creditor to prove the actual existence of the necessity of those things which give rise to his demand.

The owners are not personally responsible for debts contracted by the master for repairs, beyond the value of the ship and freight.

Nor can any terms inserted in a bottomry-bond, by the master, make them responsible for a greater amount.

A bottomry-bond executed by the master, hypothecating as well the *cargo* as the ship and freight, will not render the owners of the ship personally responsible to the owners of the cargo, beyond the value of the ship and freight.

The master has the power to pledge the ship and freight, only in cases of necessity—that is to say, where it is necessary for the interest of the owner, or there is reasonable ground to believe it will be for his interest; and the lender on bottomry is bound to show the existence of this necessity, otherwise, he is not entitled to recover, even against the ship and freight.

And because it may sometimes be for the interest of the cargo to have the vessel repaired, the power is given to the master to sell a part, or hypothecate the whole, if necessary, to raise funds for that purpose; but the lender must show that the necessity existed, otherwise, he is not entitled to recover on his bond.

If the owner of the cargo stands by and suffers the cargo to be sold under the bottomry-bond, without requiring evidence of the necessity for the repairs, it will not avail him, in an action against the ship owners, to show that the necessity did not exist.

Circuit Court, November Term, 1841.

TANEY, C. J. This action is brought to recover damages for the non-delivery of a cargo of copper ore, shipped in Chili, on board the brig Hope, Frederick Barkman, master,

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and consigned to the plaintiffs, who are merchants residing in Liverpool. The bill of lading is in the usual form, and was signed by the master on the 1st of July 1836, at Heradura de Carrisal, whereby he engaged to deliver the said cargo to the plaintiffs, at Swansea, in Wales, with the usual exception of the dangers of the seas.

It appears from the evidence, that the defendants, who reside in Baltimore, were the owners of the brig. She sailed from Baltimore, for Montevideo, on the 22d of October 1835, with a cargo of lumber, and was consigned to Carreras, Patrick & Butler, merchants, of Montevideo, who were authorized to send her to any foreign port, with directions to remit the freight that might be earned to the defendants; this appears from the letter of Captain Barkman to the owners, written from Montevideo. The vessel arrived safely at Montevideo, and delivered her cargo; and the master, by the orders of the consignees, afterwards proceeded to Buenos Ayres, and signed there a charter party to Dickinson, Price & Co., by which the brig was to go round Cape Horn to Valparaiso, and to two ports in Chili, to take on board a cargo of copper ore, and then proceed to England, where the cargo was to be delivered. She sailed, accordingly, for Valparaiso, in February 1836, consigned to the charterers, and on the passage sprung a leak, which made it necessary to heave her down and make some repairs at that port; the exact amount of repairs and other expenses at Valparaiso, amounted to the sum of \$3445, for which bills were drawn on the defendants, and paid by them.

After the repairs were made, the master called on Dickinson, Price & Co., and offered himself ready to proceed on the voyage, according to the charter-party; but they declined fulfilling the contract, alleging that the vessel was too old, and saying that they would have nothing to do with her. The master thereupon advertised her for charter, and after a delay of about fifteen days, succeeded in chartering her to Sewall & Patrickson,

of Valparaiso, to proceed from that port to two ports in Chili, to load with copper ore for Swansea, in Wales, where the cargo was to be delivered to the plaintiffs. The cargo was taken on board pursuant to this charter, the master signed the bill of lading in the usual form, and the vessel sailed for her port of destination. In passing round Cape Horn, she was overtaken by severe weather, from which she suffered a great deal of damage in her hull and rigging, and was with difficulty kept from sinking, but succeeded in making the port of Pernambuco, where she arrived in great distress, and altogether unable to proceed on her voyage.

It does not appear that the master attempted to procure another vessel. He landed the cargo, and proceeded to make extensive repairs upon the brig. The whole cost of the repairs and expenses at that port amounted to the sum of £3150 sterling, for which sum with seventy per cent. premium, he hypothecated the ship, freight and cargo to the lender; the whole sum, including the premium, being £3780, for which a bond was executed, payable in ten days after the vessel should arrive at Swansea, in Wales. The brig proceeded to her port of destination, where she arrived safely about the middle of April 1836. The money for which the hypothecation was given, not being paid, the lender proceeded in the admiralty court against the vessel, freight and cargo, and they were all sold by the decree of the court, no one having appeared on the part of the brig or cargo, to contest the claim of the bond-holder. The proceeds were not sufficient to pay the sum for which they were hypothecated.

It appears also that the portion of the aforesaid sum chargeable to the cargo, for the general and particular average, amounted to £642 8s. 11d., which was paid to the owners of the cargo by the underwriters; the freight amounted to £1189, 5s. 1d.; the net proceeds of the cargo, sold under the bottomry, was £3396, 19s. 5d.; and this suit was brought to recover from the owners of the ship the



amount of the net proceeds of the cargo, after deducting the sum received from the underwriters and the freight.

The ship was charged, in the settlement of the general average, with £181 19s.; so that the repairs put on the ship, and her expenses at Pernambuco, with which she was charged, over and above her portion of the general average, amounted to upwards of ten thousand dollars. She was bought by her owners in Baltimore, shortly before she sailed on her voyage from the port, for \$4000, and she was sold under the bottomry for £600 sterling. The repairs at Pernambuco cost more than double as much as she was worth at Baltimore, before she sailed, or in England, after the repairs were put upon her.

It was admitted, that the ship was not insured, and that the owners had received nothing on account of the general average loss incurred as above stated.

The ship and freight having thus been appropriated to the payment of the bottomry, and totally lost to the owners, the question raised here is, whether they are personally responsible to the owners of the cargo, for the loss sustained by them? And the first inquiry is, by what rule of law are we to measure the rights of the plaintiffs, and the liabilities of the defendants, under a contract like the one now sued on?

The plaintiffs insist that we must be governed by the rules of the common law; that the defendants, under the charter-party and bill of lading, were common carriers for hire, and as such were liable for any loss of the cargo, unless it happened by the act of God, or a public enemy, provided it did not fall within the exception of the dangers of the seas. But there is no sound reason for applying to this case the principles of the common law in relation to common carriers for hire. In the first place, the master, according to the doctrines of the common law, was not authorized to bind even the brig or her value, by a contract like this. In all of the cases (with the exception of that of *Baucher v. Lawson*, Rep. Temp. Hardwick 531), in

which the owner was held responsible as a common carrier, upon contracts made by the master, it appeared that the master was entrusted by the owner, not only to navigate the vessel, but also to make contracts for her employment, or to receive goods for certain ports at the customary freight. Without examining them all separately, it is sufficient to remark, that in the case of *Ellis v. Turner*, which is comparatively a late one (8 Term Rep. 531), in order to charge the owner, evidence was offered to show that it was not usual for the master to confer previously with the owners, as to the terms on which he was to take goods on board, he having a general authority or discretion to receive and convey goods for the customary freight between the ports there mentioned. And in the case of *Baucher v. Lawson*, above referred to, in which the court said that the owner would have been liable for the doubloons taken on board at Lisbon, to be carried to London, if it had appeared that the ship was employed in carrying goods for hire, Lord Hardwick evidently meant that the owner would have been responsible, if it had appeared that he had given him authority so to employ her and to make such contracts. For the court decided against the liability of the owner, although the contract for the freight was made by the master, upon the ground, that it did not appear that the ship was employed in carrying goods for hire, and for aught that appeared, might have been sent to Lisbon for a special purpose. The office of master, therefore, was not, in that case, supposed to be sufficient authority, of itself, to enable him to bind the owner by a charter-party or a contract of affreightment: and upon that point it does not differ from the case of *Ellis v. Turner*, before cited, and the other cases upon the same subject. They all agree that in order to render the owner answerable for cargo lost, it is not sufficient to show that the contract for transporting it was made by the master; but the party claiming remuneration must go

further, and show that the owner had given authority to the master to make such a contract. His appointment as master, does not, of itself, upon the principles of the common law, confer the authority.

In this case, the brig was consigned to Carreras, Patrick & Butler, at Montevideo, with directions to employ her, if they thought it proper to do so, in a voyage to some other foreign port; and they were instructed, if they did so employ her, to consign her to their friends, and to remit the freight, if any was earned, to the owners at Baltimore. It is in proof, therefore, that no authority was given, or intended to be given, by the owners, to the master, to charter the brig, nor to receive any goods or freight, except under the direction of the consignees or their agents; on the contrary, he was carefully excluded from all such authority by the owners, and confined to the duty of navigating the vessel, as master, upon the voyages determined upon by the proper agents. When Dickinson, Price & Co. refused to execute the contract made with the consignees, it was the duty of the master to notify them of what had happened, and to wait their orders; he had no right, according to the rules of the common law, in relation to principal and agent, or master and servant, to enter into the contract under which the voyage in question was performed; it was not within the scope of the authority conferred on him, and was not binding on the owners or their friends.

But assuming this contract to be obligatory upon the owners, upon common law principles, is there any ground for measuring the extent of their liability by its rules, founded on the ancient customs of England? The contract was made in Chili; the cargo was laden there; it was to be transported on the high seas to England, where it was to be delivered. Now, there can be no pretence for saying, that the principles of the common law, in relation to carriers for hire, prevail in Chili; and it is equally certain, that, upon a contract of this description, these ancient

rules are no longer the law of England; since the statute of 53 Geo. III., it does not bind the owners beyond the value of the ship and freight. The words of the statute are abundantly plain; and the cases of *Wilson v. Dickson*, 2 Barn. & Ald. 2, and *Cannan v. Meaburn*, 1 Bing. 465, show how that statute has been expounded and applied in the common law courts. If the master had sold the whole of this cargo at Pernambuco, instead of hypothecating it, the owners would not have been answerable beyond the value of the ship and freight. In the country, therefore, where the contract was made, and in the country where it was to be finally executed, the rights and obligations of the parties did not depend upon the doctrines of the common law, in relation to carriers for hire. Upon what ground, then, can the court apply them here?

The ancient common law, in relation to carriers for hire, is, undoubtedly, in force in Maryland; but there is no principle of jurisprudence upon which the court can expound this contract by the laws of this state. It was not made here; and no part of it was to be performed within our territory. The ship-owners, it is true, reside here; but the law of the domicile of the party does not govern the contract, nor determine his rights or obligations; they depend upon the law of the place where it was made, or where it was to be executed. In this case, the law of neither the one nor the other furnishes any ground for charging these defendants, according to the rules of the common law, in relation to carriers for hire; that law, therefore, cannot give the rule by which this court should decide the rights of the parties.

Undoubtedly, the master had a right to make this contract, under the circumstances in which he was placed, and the owners were bound by it; but this right is derived from the maritime code, which is founded in the general usages and convenience of trade, and which has been adopted, to a certain extent, by all commercial nations.

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The bill of lading (the contract on which this suit is brought) is an instrument founded on the usages of trade, and not connected with any of the peculiar doctrines of the common law. We must look, therefore, to the maritime code, as acknowledged and administered in this country, in order to expound this contract, and to determine the extent of the obligations it imposed upon the owners.

It is stated in *Abb. on Ship.* 90-93 (Story's edition of 1829), that a charter-party, made by a master in a foreign port, in the usual course of the ship's employment, and under circumstances which do not afford evidence of fraud, binds the ship and freight; and therefore, to the amount of the value of the ship and freight, the owners are, by the maritime law, bound to the performance; and the same doctrine is laid down in 3 *Kent's Com.* 162 (3d edition). At the time then that the vessel sailed for Swansea, where the ore had to be delivered, the ship and freight were bound for the performance of the contract into which the master had entered. It is not suggested, that anything happened before the arrival of the vessel at Pernambuco, which would render either the ship, or freight, or owners, answerable for the loss sustained by the cargo. The damage sustained in the voyage round Cape Horn was occasioned by the dangers of the seas, which made it necessary, for the safety and interest of all concerned, that the vessel should put into Pernambuco; and if the ship-owners are responsible for the cargo, their liability must arise from something that was done by the master at this port. Upon the arrival at Pernambuco, it was found, that the vessel was damaged to such an extent, that she was unable to proceed on her voyage, and the cargo was landed; under these circumstances, from the necessity of the case, the master became the agent for the cargo as well as the ship, and in that character, it was his duty to deal with the cargo as a prudent and discreet owner would have done, if he had been on the spot at the time. He might transship

it, and earn freight for his owners. If his own ship could be repaired in a reasonable time, he had a right to retain it until his ship was ready; and, if necessary, might sell a part of the cargo, or hypothecate the whole, in order to obtain money for the necessary expenses of repairs; or he might abandon the voyage, and notify the owners of the cargo of the disaster which had happened, and await their orders as to its future disposition—so far as to his power over the cargo.

Now as to the ship—upon this point, the law has been laid down by the supreme court, in the case of *The Aurora*, 1 Wheat. 102, 106, and it is unnecessary, therefore, to multiply cases upon the subject. The master may, in a foreign port, contract for repairs and supplies, and thereby bind the owners to the value of the ship and freight, or he may hypothecate the ship and freight, and thereby create a direct lien upon them for the security of the creditors. But the authority of the master is limited to objects connected with the voyage, and if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities; and it is incumbent on the creditor to prove the actual existence of the necessity of those things which give rise to the demand. In the case of *The Virgin*, 8 Peters 538, it was held, that the master could not pledge the personal credit of the owners, at the same time that he gave a bottomry on the ship; that if the bottomry-bond contained a clause to that effect, it would be void, and the owners be personally bound only to the extent of the pledged fund which actually came to their hands.

In the case before us, then, the master had a right to pledge the ship and freight, in which case, the owners are answerable no further than the amount of the pledged fund which comes to their hands; or he might have pledged the personal responsibility of the owners to the value of the ship and freight, in which case, if the ship had been lost on the voyage, they would have been responsible to that amount.

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This is the extent of the authority which the law gives to the master, in a foreign port, and if he exceeds it, his acts are void. If, therefore, in this case, the master had pledged to the bottomry-lender, the personal responsibility of the owners, to the value of the ship and freight, and *cargo* also, the pledge, as respects the value of the cargo, would have been void, and without lawful authority, and the owners not responsible. Can he then, by pledging to the bottomry-lender the cargo, enlarge his authority in relation to the personal responsibility of the ship-owner, and indirectly bind him, not only for the value of the ship and freight, but for the value of the cargo also? The limitations upon the power of the master so carefully stated by the supreme court, are utterly nugatory, if by this circuitous mode, he is permitted to do what he cannot do directly; and by hypothecating the cargo, exercise a power over the fortunes of his owners to an unlimited extent. We think it cannot be done; and that the value of the ship and freight only were bound, so far as the ship-owners were concerned; and as no part of that fund has come to their hands, they are not personally responsible, either directly or indirectly, for the repairs at Pernambuco.

We are not aware of any decision in England or in this country, upon the precise point now before the court. But in the case of *The Gratitude*, 3 Rob. 257, Ld. Stowell strongly intimates an opinion that, in a case like this, the ship-owner would not be responsible to the owner of the cargo; and in 3 Mason 255, 260, it appears, from the language of the court, that Judge Story also doubted the liability of the ship-owner.

The justice and sound policy of the rule which restricts the power of the master over the property and fortune of his owner, to the value of the ship intrusted to his command and the freight she may earn, is proved by its deliberate adoption by every commercial nation in Europe; and we should be very unwilling to establish a contrary principle in this country, unless very clear and decisive

authorities compelled us to the decision. For it would place the American ship-owner in a far worse condition than his European rival, and compel him to hazard his whole fortune, however large, upon every distant voyage made by one of his ships. And as the evil could be cured only by the legislation of the states, different rules would perhaps be established in different places, and the mischief to commerce increased by conflicting laws in the several states.

The principles stated by Lord Hardwicke, in the case of *Boucher v. Lawson*, in relation to the liability of the owner, although restricted to much narrower limits than those now contended for, appears to have surprised the commercial community of Great Britain, since they immediately petitioned for, and obtained an act of parliament limiting the responsibility of the owner, in cases like that of *Boucher v. Lawson*, to the value of the ship and freight. And when it appeared, from the decision of the court of King's Bench in the subsequent case of *Sutton v. Mitchell*, 1 T. Rep. 18, that the former act of parliament did not cover all cases of the loss of cargo, the ship-owners immediately petitioned for, and procured the passage of an act extending the restriction to other cases; and finally obtained the law 53 Geo. III. ch. 159, which, in every case of loss of cargo, without the fault of the owner, limits his liability to the value of the ship and freight. (Abb. on Ship. 264-268, Story's edition of 1829.) The history of these acts of parliament, shows that in the two decisions above mentioned, the principles adopted by the court carried the responsibility of the ship-owner, in England, farther than it had been supposed to extend in the commercial world; and the limitations procured immediately afterwards by act of parliament, show the apprehensions which these decisions excited, and the general sense of the trading community, that the liability should have been restricted to the value of the ship and freight. We are satisfied that, at this day, this is the general understanding of those who



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are engaged in commerce, and that the contracts are always made by both parties under that impression; and there can be no necessity or propriety in pushing the liability beyond the bounds prescribed by the general usages and understanding of the commercial world.

There is another view of this case, in which it appears to be evidently unjust and inequitable for the plaintiffs, to charge these defendants for the loss of the cargo. The master has the power to pledge the ship and freight only in cases of necessity, that is to say, where it is necessary for the interest of the owner; or there is reasonable ground to believe it to be for his interest; and the lender on bottomry is bound to show the existence of this necessity, otherwise, he is not entitled to recover, even against the ship and freight. Now, it never can be necessary for the interest of the owner of the ship to place upon her repairs, which cost more than double the amount of what she is worth after the repairs are made. There may be cases in which it may be for the interest of the owner of the cargo to do so; because the cargo may be of great value at the port of destination, and of little or no value at the port of necessity; it may be perishable in its nature; it may appear to have been impossible to procure another vessel in time to save it; and it may be the interest of the owner of the cargo to have repairs made upon the ship far beyond her value, in order to enable her to transport his property to its place of destination. If there was any necessity which could have justified the enormous expenditure for repairs in this case, it must have been the necessities of the cargo, and not of the brig; for the repairs unavoidably sacrificed the vessel and freight, and nothing could be gained by them except for the cargo.

It is because it may sometimes be for the interest of the cargo to have the vessel repaired, that the power is given to the master to sell a part, or hypothecate the whole, if necessary, in order to raise funds for that purpose. But his power over the cargo is like his power over the ship in

this respect; the lender must show that the necessity existed, otherwise he is not entitled to recover on his bond. (Abb. on Ship. 129, Story's edition of 1829; 3 Kent 133, 1st edition.) Now in this case, although the cargo was not perishable, and although it does not appear that it could not have been transshipped at the same freight, and although the hypothecation has resulted most disastrously to the cargo as well as to the ship; yet, at Pernambuco, where the cargo must have been of very little value, and where very high calculations may have been formed of its value at Swansea, it may have been supposed that the interest of the owner of the cargo required that these extensive repairs should be made, in order to transport it to its port of destination.

If a discreet and prudent man, placed in the situation of the master, would have supposed so, then the hypothecation was lawful, and within the scope of his authority. Bad faith in this transaction is not imputed to him on either side; if he acted in good faith, and the interests of the cargo justified him in hypothecating the whole of it, there can be no good reason for charging the ship-owner with the unfortunate results of the contract made for the benefit of the owner of the cargo; but if, on the other hand, the interests of the cargo did not authorize the hypothecation, then the lender of the money obtained no lien upon it, since it was his duty to see that the necessity existed before he lent his money, and he was bound to prove its existence, if required to do so, to the satisfaction of the court, before he could enforce his lien. It appears from the evidence in this case, that the present plaintiffs stood by and saw the whole cargo sold, without appearing in the admiralty court to defend it, and without requiring from the lender any proof whatever of the necessity of the case. In either alternative, therefore, whether the necessity did or did not exist, it would be unreasonable and unjust to charge the ship-owner with the loss of the cargo arising from the hypothecation at Pernambuco; if justifiable, it

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was made for the benefit of the cargo, and at the sacrifice of the interests of the ship-owner; if not justifiable, it was lost by the negligence of the plaintiffs, to whom it was consigned, and who took no measures to protect it.

It is, perhaps, hardly necessary to remark particularly upon the opinion expressed by Mr. Benecke in his book on *Average*, p. 253, that the ship-owner is personally liable for the value of the cargo in a case like the present. It is his inference from the various cases which have been cited in the present argument, and he refers to no case in which the point has been decided, nor even suggested that there is any established usage at Lloyd's upon this subject.

Upon the whole, we think that the master in this case had no right to pledge the ship-owner beyond the value of the ship and freight, and that the plaintiffs, therefore, are not entitled to recover.

*J. Meredith*, for plaintiffs.

*J. Glenn* and *R. Johnson*, for defendants.

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GEORGE B. HOFFMAN and WILLIAM H. HOFFMAN

*vs.*

NATHANIEL F. WILLIAMS, Collector.

The second clause of the second section of the tariff act of 14 July 1832, provides that the duty upon blankets, "*the value whereof, at the place from whence exported, shall not exceed seventy-five cents each;*" shall be five per cent. ad valorem: *Held*, that in estimating the "value," under this clause, of blankets manufactured at Leeds, and sent to Liverpool for exportation, the cost of transporting them to Liverpool, including the freight or carriage, must be taken into the account.

Circuit Court, November Term, 1842.

TANEY, C. J. This action is brought against the collector, to recover the amount of certain duties charged by him

and disputed by the plaintiffs, but paid under protest. The case has been submitted to the court upon a case stated; but the statement is imperfect, and in order to enable the parties to bring the point in controversy before the court in such a form that judgment may be entered, we proceed to state the construction we give to the act of congress, and to point out wherein the statement submitted to the court is defective.

The case states that a parcel of blankets were imported by the plaintiffs, from Liverpool, into Baltimore, and that the value thereof, at the place of exportation, without including charges, did not exceed seventy-five cents each; but it is not stated what charges are excluded, nor what was the value of the goods, taking the charges into consideration. It was said at the bar, that the goods were purchased at Leeds, by the plaintiffs, for less than seventy-five cents each; that the charges for transporting them to Liverpool, added to the original price, would make the cost, at the place of shipment, greater than the sum above mentioned; and that the collector has added these charges to the original price, in order to determine the value at the place of exportation, and charged the duties accordingly; but the value as thus ascertained is not stated.

We understand it to be assumed on both sides, that the fifteenth section of the act of 14 July 1832, directing the mode of ascertaining the *ad valorem* duties, does not embrace this case, and that it depends solely upon that part of the second clause of the second section, which provides, that the duty upon blankets, "*the value whereof, at the place from whence exported, shall not exceed seventy-five cents each,*" shall be five per centum *ad valorem*. Admitting this to be the true construction of the act of congress, and that the case is not embraced by the fifteenth section, yet, as these blankets were exported from Liverpool, the duties must be charged upon their value at that place, at the time of exportation; if they were worth there more than seventy-five cents each, the duty must be charged accordingly, although they

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may have been purchased for less, at Leeds; and the cost of transporting them to Liverpool, including the freight or carriage, must be taken into the account in estimating their value at that place.

It has, however, been urged upon the part of the plaintiffs, that the word "*value*," in the clause in question, means the value independently of any charges incurred after they were purchased; and that the word "*value*" is so used in the fifteenth section, which directs the charges to be added to the actual value in the cases embraced by that section. And it is insisted, that the same word in the second section ought to be expounded in the same sense in which it is used by the legislature in the fifteenth, and that the charges of transportation, therefore, ought not to be taken into the account.

Undoubtedly, the word "*value*" must receive the same construction in both clauses of the law. But the fifteenth section speaks of value at the place of *purchase*, and the clause in question speaks of the value at the place *whence exported*. In the fifteenth section, the legislature directs the charges to be added to the actual value at the place of purchase; and by this means the value at the place of exportation is ascertained. And the reason why the same provision is not contained in the second section is, that these charges necessarily enter into the value of the goods, when they have been brought to the place of exportation. The value of these blankets, at Leeds, was the sum they were worth there, when deposited in the warehouse, ready for sale and delivery; and their value at Liverpool, was the sum they were worth at that place, when deposited in the warehouse there, ready for exportation.

But since the argument upon the case stated, we have carefully examined the provisions contained in the fifteenth section; and we see no sufficient reason for supposing that it does not extend to the case before the court. That section prescribes the mode of estimating the ad valorem duties, in all cases in which they are imposed by that act of

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congress. The duty in question is one of that description, and not a specific one upon each blanket; it is imposed upon the article according to its value, and is described as a duty ad valorem, in terms, in the clause by which it is imposed. We think it very clear that it is embraced in the fifteenth section, and that the rule there prescribed must be followed, in estimating the duty upon these blankets, and ascertaining their value at the place of exportation.

If the facts are properly presented by a case stated, the court, as we have already said, orally, will proceed to give judgment upon the principles above stated; but if the facts are not admitted, the value must be determined by a jury, under the direction of the court, and the duties ascertained in the mode pointed out in the fifteenth section of the law.

Judgment of non pros.

*Wm. F. Frick*, for plaintiffs.

*Z. C. Lee*, District Attorney, for defendant.

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GEORGE P. REED

*vs.*

SAMUEL CARUSI.

It is for the jury to determine, upon the whole evidence, whether the person obtaining a copyright for a musical composition, was the author of it or not.

If the musical composition was borrowed altogether from a former one, or was made up of different parts, copied from older musical compositions, without any material change, and put together into one tune, with only slight and unimportant alterations or additions, then the composer was not the author, within the meaning of the act of congress.

But the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design, and in its material and important parts, the effort of the composer's own mind.

## Reed v. Carusi.

The copyright is *prima facie* evidence that he was the author; and the burden of proof is upon the defendant to show the contrary.

The defendant is liable for an infringement of the copyright of a musical composition, "if he caused it to be engraved, either on the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law;" "or if he caused it to be printed for sale, in such manner and for such purpose."

But he is not liable, unless the musical composition caused to be engraved, or printed for sale by him, is the same with that for which the copyright is secured, in the main design, and in its material and important parts, altered to evade the law.

Nor is he liable, although it is the same in these respects, provided it was not taken from the piece for which the copyright was obtained, but was the effort of his own mind, or taken from an air composed by some other person who was not a plagiarist, from the piece for which such copyright was obtained.

There can be no recovery for any infraction of the copyright, not committed within two years before action brought.

But every printing for sale is a new infraction of the copyright, although the plates used were engraved more than two years before the institution of the action.

Where a suit was docketed, by consent, in November, "as of April Term" preceding: *held*, that so far as limitation is concerned, the suit will be taken as brought on the first day of the April term.

## Circuit Court, November Term, 1845.

This was an action of debt, under the act of congress passed 3d February 1831, sect. 72, for the infringement of a copyright obtained in the year 1840, by the assignor of the plaintiff, for the music of the well-known ballad called "The Old Arm Chair."

The action was, on the 4th November 1844, docketed, by consent, "as of April Term 1844," the April term commencing on the first Monday in that month.

The opinion of the court was delivered by

TANEY, C. J. 1. The defendant is not liable to this action, unless the jury find that Russell was the author of the musical composition called the "Old Arm Chair," for which he obtained a copyright in 1840; and it is for the jury to decide, upon the whole evidence, whether he was

or was not the author. If the said musical composition was borrowed altogether from a former one, or was made up of different parts, copied from older musical compositions, without any material change, and put together into one tune, with only slight and unimportant alterations or additions, then Russell was not the author within the meaning of the law; but the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design, and in its material and important parts, the effort of his own mind. The copyright is *prima facie* evidence that he was the author, and the burden of proof is upon the defendant to show the contrary.

2. If the jury find that Russell was the author of the said musical composition, then the defendant is liable to this action, if (in the language of the act of congress) "he caused it to be engraved, either on the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law;" "or if he caused it to be printed for sale, in such manner and for such purpose." But he is not liable, unless the musical composition caused to be engraved or printed for sale by him, is the same with that of Russell, in the main design, and in its material and important parts, altered, as above mentioned, to evade the law; nor is he liable to this action, although it is the same in these respects, provided it was not taken from Russell's, but was the effort of his own mind, or taken from an air composed by some other person, who was not a plagiarist from that of Russell.

3. If the jury find against the defendant upon the two preceding instructions, yet he is not liable in this action, unless he was guilty of the infraction of the copyright within two years before this action was brought; but if the plates were engraved more than two years before, yet every printing for sale caused by the defendant, would be a new infraction of the right; and if such printing was



Reed v. Carusi.

within two years before the suit was brought, the defendant is liable in this action. Under the agreement endorsed by counsel, upon the declaration, the suit, so far as limitation is concerned, must be regarded as brought on the first Monday in April 1844.

4. If the jury find the defendant liable, they will find the number of copies caused to be printed for sale by him, within two years before the suit was brought, and find the debt at the rate of one dollar for each sheet he may have caused to be so printed for sale.

Verdict and judgment for \$200.

*J. H. B. Latrobe*, for plaintiff.

*Wm. F. Frick*, for defendant.

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SAMUEL D. CULBERTSON, ASSIGNEE OF THOMAS CHAMBERS,

*vs.*

MICHAEL STILLINGER.

An action at common law, upon a bond, must be determined according to the rules at common law, and without reference to the relief which the defendant might obtain in a court of equity.

A bond given by an executor for the payment, to his surety, of one-half of his commissions, from time to time, as they may be allowed, in consideration of his consenting to become such surety, is a valid instrument.

The law will not annex to such a bond a condition precedent, that the surety shall continue solvent till the estate is finally settled, before he will be entitled to any of such commissions.

The premium paid by the executor to the new surety, if additional security be required by the orphans' court, is not a legal set-off to an action on such bond.

But counsel fees paid by the executor, in establishing the amount of his commissions, will be a proper credit on the portion of commissions to be paid to the surety, in proportion to the share of said commissions which the surety is to receive.

*Culbertson v. Stillinger.*

An agreement by the surety, not under seal (executed after the bond), not to claim any part of the commissions which may accrue during the lifetime of the testator's widow, will not be considered a condition annexed to the bond, nor a release or defeasance thereof.

Such agreement would be enforced in a court of equity.

Upon proceedings in equity the question would be open, as to what deduction ought to be made, for a premium paid by the executor, to procure a new surety required to be given by him in consequence of the first surety becoming insolvent.

And upon such proceedings in equity, the question also would be open, as to whether the bond given to the first surety would create a liability to pay any part of the commissions accrued after the said surety had become insolvent.

Circuit Court, April Term, 1846.

This was an action of debt, brought the 9th December 1844, upon a bond executed by the defendant Thomas Chambers, whose assignee in bankruptcy was the plaintiff in the suit.

The condition of the bond was as follows :

“Whereas, by the last will and testament of Michael Riddlemoser, late of Baltimore county, deceased, the above-bound Michael Stillinger was appointed one of the executors of said last will and testament, and, by the renunciation of the other persons named as co-executors in said last will and testament, since its execution and admission to probate in the orphans' court of Baltimore county, has become sole executor: and whereas, the said above-bound Michael Stillinger has found much difficulty in procuring such security for the faithful discharge of his duties as executor as aforesaid, as would be received as sufficient by said orphans' court, and has applied to the said Thomas Chambers to become one of his said securities, and in consideration of the risk, and trouble and responsibility, that would be incurred by the said Thomas Chambers, in becoming one of his said securities as executor as aforesaid, has agreed to account for and pay over to the said Thomas Chambers, from time to time, as the same may be received

Culbertson v. Stillinger.

and allowed by the said orphans' court, one-half of the sum or amount of money, that may be allowed to the said Michael Stillinger, for his commissions, as executor as aforesaid, by the said orphans' court, for the sole use and benefit of the said Thomas Chambers: and whereas, the said Thomas Chambers has agreed to become one of the securities of the said Michael Stillinger, as executor as aforesaid:

"Now the condition of the above obligation is such, that if the above-bound Michael Stillinger shall well and truly account for, and pay over to, the said Thomas Chambers, his executors, administrators or assigns, for his and their sole use and benefit, from time to time, as the same may be received and allowed by the said orphans' court, one half of the sum or amount of money, that may be allowed to the said Michael Stillinger, for his commissions, as executor as aforesaid, by the said orphans' court; and shall well and faithfully, in all respects, discharge his duties as executor as aforesaid, then the foregoing obligation to be void and of none effect, otherwise to be and remain in full force, virtue and effect in law."

MICHAEL STILLINGER, [SEAL].

Signed, sealed and delivered in presence of

JAMES KERNAN.

On the day of the date of this bond, the said Chambers and Stillinger signed the following agreement:

"It is agreed and understood between the subscribing parties, that the said Chambers releases all his claim and right to certain commissions on the rents and proceeds of the estate of Michael Riddlemoser, vested in him by agreement, executed this day, between the said parties, during the lifetime of the widow of said Michael Riddlemoser. Witness our hands, this 15th day of January 1833.

JAMES KERNAN,

THOMAS CHAMBERS,  
MICHAEL STILLINGER."

The defences taken by the defendant were—

1. The above agreement was a defeasance of the bond, to the extent of the commissions allowed anterior to the death of the widow of said Riddlemoser.

2. That additional security upon the bond of Stillinger was ordered by the orphans' court, in consequence of the reputed insolvency of Chambers; that Chambers was called upon to furnish such additional security, but failed to do so, and the same was procured by Stillinger himself, prior to the death of Mrs. Riddlemoser (for which he had to pay \$2000), and therefore, the plaintiff was not entitled to recover for any of the commissions allowed after such new security was given.

3. That the said Chambers was insolvent at the time of the execution of the bond sued on.

4. That said Chambers became a bankrupt before the settlement of the estate, and that he ceased to be a security on the bond of Stillinger, after such bankruptcy, and his assignee was not entitled to recover any part of the commissions accrued after such bankruptcy.

5. That the defendant was entitled to a credit of \$700, being one-half of fees paid to counsel, employed by him to establish the amount of commissions received by him.

TANEY, C. J. This being an action at law upon a bond, the questions which arise upon the case stated, must be decided according to the rules at common law, and without reference to the relief which the defendant might obtain in a court of equity.

1. We think the bond is a valid contract, and not contrary to the policy of the law; undoubtedly, any agreement to pay money, in order to obtain an appointment to a public office, would be void; but if this principle extends to the appointment of an administrator by the orphans' court, yet it will not embrace the case before us; for the money was not to be paid to assist the party in procuring the appointment. He had already been selected and

appointed executor by the testator, who had, unquestionably, a right to make the appointment; and the money was to be paid for the purpose of enabling him to execute the duties of his appointment, and to carry into effect the wishes and intentions of the testator.

2. Neither is the continued availability of the security given, until the estate was finally settled, a condition precedent, to be performed by Chambers, before he became entitled to any part of the commissions; on the contrary, his share was to be paid to him, from time to time, as the commissions accrued and were allowed by the orphans' court, and it was not to wait for the final settlement, before it became due and payable.

3. The premium paid to the new surety, when additional security was required by the court, is not a legal set-off in this action. Chambers did not contract to furnish it, if called for; nor make any contract, express or implied, to reimburse the amount paid by the defendant. And, sitting in a court of law, we cannot apportion the premium contracted to be paid to Chambers, upon the ground that there has been an accidental failure of a part of the consideration for which this premium was to be paid.

4. The executor had, undoubtedly, a right to employ counsel, and there is no evidence to show that the fee paid was unreasonable or unusually high. It is, therefore, a legal credit against the present claim, in proportion to the share of the commissions to which Chambers is entitled.

5. The agreement between Chambers and Stillinger, as to the commissions in the lifetime of the testator's widow, is not a condition annexed to the bond. It is not endorsed upon the bond delivered to Chambers, but is a separate instrument, and upon the face of it, was executed after the bond, although upon the same day; for it refers to certain rights, which Chambers had acquired upon the bond, and agrees to release them. And as this instrument is not under seal, it cannot operate as a release or defeasance.

Undoubtedly, it would be enforced in a court of equity;

and, upon a proceeding there, the question would also be open as to the deduction proper to be made on account of the new security required by the court; and whether, upon principles of equity, Chambers was entitled to any share of the commissions which accrued after his name had ceased to be available as a surety, and his credit become insufficient to protect the executor in the possession of his letters testamentary.

But upon the case stated we think the defendant has no defence at law, and therefore direct the judgment to be entered on the verdict, with interest until paid, deducting first the one-half of the counsel fee.

Verdict and judgment for the plaintiff.

*William Schley*, for plaintiff.

*G. L. Dulaney* and *Wm. Meade Addison*, for defendant.

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WILLIAM GOLDSBOROUGH, ADMINISTRATOR OF  
CHARLES H. GOLDSBOROUGH,

*vs.*

UNITED STATES.

An acting purser in the navy, holding no other naval office at the time, is not entitled to a commission of  $2\frac{1}{2}$  per cent. upon the money disbursed by him for the government.

Where an act of congress declares that an officer of the government, or public agent, shall receive a certain compensation for his services, which is specified in the law, that compensation can neither be enlarged nor diminished by any regulation or order of the president, or of a department, unless the power to do so is given by act of congress.

The compensation of an *acting* purser for services rendered in the ordinary line of his official duty, is regulated by the act of 18 April 1814, ch. 143, which declares that a *purser* shall receive \$40 per month and two rations a day; and as the secretary could not increase this compen-

## Goldsborough v. United States.

sation, by enlarging the monthly allowance, or by increasing the number of rations per day, neither can he do it in the shape of commissions, when no such commissions are given by law.

There is no distinction in this respect between a purser and an acting purser; the latter being lawfully in the office of purser, and authorized to perform its duties, is entitled to the compensation which the law has provided for such service, and to nothing more.

The construction of a law by the navy department, and the practice under it, cannot be allowed to alter the law, nor to control its construction in a court of justice.

The exercise of a power not warranted by law, by the head of a department, cannot create such an equity against the United States, as will be recognised and enforced in a court of justice.

The act of congress of 3 March 1809, ch. 95, does not apply to the office of purser.

The plaintiff's intestate, as acting purser, had a right, in his transactions with individuals, to the profits and advances authorized by the regulations of the navy department, which regulations were unquestionably consistent with the law creating the office of purser, and warranted by it, and were, therefore, lawfully issued by the secretary, and binding upon the parties concerned.

Circuit Court, April Term, 1840. Error to the District Court.

This was an action of assumpsit, brought in the district court, by the United States against the administrator of Charles H. Goldsborough, deceased. The amount in dispute was claimed by the defendant, as a proper allowance for commissions, at the rate of  $2\frac{1}{2}$  per cent., upon the disbursements made by the deceased, as acting purser, in the years 1835-1836.

The deceased was an acting purser, on a foreign station, at the time the disbursements were made, on which the  $2\frac{1}{2}$  per cent. commissions were claimed; he had been appointed by the captain of the ship in which he served, to fill a vacancy, and died without having his appointment confirmed; he held no other naval office than that of acting purser.

At the trial, the defendant offered in evidence the following regulations of the navy department, and the following letters:

*Circular.*

Navy Department, April 1, 1833.

Sir: The commissions allowed to consuls, or any foreign agents (now paid by a per-centage), for any business transacted for the navy department, after the first of July next, shall not exceed  $2\frac{1}{2}$  per cent.

Though the rule formerly was to allow pursers a commission, and especially meant acting ones, it has been discontinued some years in relation to permanent pursers; and after the above period, it is not to be applied even to acting pursers, if they hold any other naval office at the same time.

LEVI WOODBURY.

*Allowance to Pursers.*

"An allowance of commissions of  $2\frac{1}{2}$  per cent., upon payments made by pursers, is of ancient date."

Treasury Department,

Second Comptroller's Office, Jan'y 19, 1838.

Sir: Upon the application of the administrator on the estate of the late purser Goldsborough, I have attentively considered the question, whether acting pursers are legally entitled to a commission on their disbursements, and I am of opinion, and accordingly decide, that the rule as recognised in the Red Book, chapter 10, *Allowance to Pursers*, sect. 1, has *not* been annulled or modified by any law, or subsequent regulation, so far as it relates to such acting pursers as hold no other naval office.

I am, sir, respectfully, your obedient servant,

ALBION K. PARRIS,

Comptroller of the Treasury.

J. C. PICKETT, Esq., Fourth Auditor.

Treasury Department,

Second Comptroller's Office, Nov. 9, 1838.

Sir: In the rules of the navy department, regulating the civil administration of the navy of the United States, pub-



lished by the secretary of the navy, in March 1832, is the following (see Red Book, page 18, chapter 10): Allowance to Pursers, sect. 1, "An allowance of commissions of  $2\frac{1}{2}$  per cent. upon payments, made by pursers, is of ancient date."

Finding this among the rules promulgated for the settlement of navy accounts, I have supposed it was to be taken as a guide by the accounting officers, especially, as in the order by which the regulations were promulgated, it is expressly provided that "circulars, regulations and orders, the contents of which are published in this compilation, though not before published, or not before received, by officers in the naval service, will be considered by them as now officially communicated, and will be their guide on the subject-matter of them, after the receipt of this volume." (See secretary's order on first page, and his letters to the officers of the navy on the second page.)

In this opinion, I have been confirmed, by a circular of the navy department of April 1, 1833, wherein the rule to allow a commission to acting pursers, *who hold no other naval office*, is expressly recognised under these two regulations. I have decided in favor of the claims of acting pursers to commissions, and I do not perceive how I can decide differently, according to what I conceive to be the legal interpretation of these two regulations. It has been suggested, that my construction does not accord with the views of the navy department. I should much regret if such were the fact, as it is my anxious wish to administer both the law and the regulations according to their just interpretation, and if possible, without doing violence to the obvious meaning of language, so as to carry into effect the intention of the framers. I have thought it due to the department to make known, in this manner, my construction of these regulations, to the end that if, in the opinion of the head of the department from which they emanated, they can legally receive, and ought to receive, a different construction, I may be so advised, or if they have received

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their true legal construction, and, in the opinion of the head of the department, it is proper that they may be modified or annulled, that such a course may be pursued as shall be deemed most advisable.

I am, with entire respect, your obedient servant,

ALBION K. PARRIS,

Comptroller of the Treasury.

Hon. J. K. PAULDING, Secretary of the Navy.

P. S. If there be doubts in the mind of the secretary as to the correctness of my decision, I have to ask that the opinion of the attorney-general may be requested thereon.

Treasury Department,

Fourth Auditor's Office, April 9, 1839.

SIR: Your letter of the 4th inst. is received, and herewith you have a reconciling statement of the last settlement of the account of the late acting purser Charles H. Goldsborough, deceased, showing the items which compose the balance due to the United States from him.

In the settlement made the 13th December 1837, at this office, the charge made for commissions on disbursements was passed to the credit of Mr. Goldsborough, but on the revision of the account by the second comptroller of the treasury, that officer refused to admit that credit, and consequently disallowed it. Therefore, you will find the sum \$1248 10 charged in the reconciliation now sent, which will explain why the balance due on the account revised the 12th January 1839, is so much more than the amount due, as you supposed, by that reported at this office in December 1837.

I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

WM. GOLDSBOROUGH, Esq., administrator of Charles H. Goldsborough, late acting purser, United States Navy, Easton, Md.

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Treasury Department,  
Fourth Auditor's Office, Sept. 11, 1839.

SIR: In reply to that part of the letter, dated the 30th ult., from Nathaniel Williams, attorney of the United States for the district of Maryland, to the solicitor of the treasury, as relates "to the voucher which claimed \$154 91 (for Charles H. Goldsborough, late acting purser United States Navy), as a clerk on board the Delaware, and which is rejected as an overcharge," which letter you referred to this office yesterday, I have to state, that the claim referred to is on the pay-roll of the ship Delaware, and is for pay and rations from the 23d February 1833, to 12th February 1834, at \$25 per month pay, and one ration or twenty-five cents per day. The muster-roll of the Delaware shows that C. H. Goldsborough, captain's clerk, did not appear on board until the 15th July 1833, from which day inclusively he was allowed pay and rations at the rate before mentioned. The amount of \$154 91, charged to him, is for his pay and rations from the 22d February to 14th July 1833. The letter of the district attorney to the solicitor, is herewith returned.

I am, sir, respectfully, your obedient servant,

F. H. GILLISS,

Acting Fourth Auditor.

ALBION K. PARRIS, Esq., Second Comptroller of the  
Treasury.

Treasury Department,  
Second Comptroller's Office, Sept. 11, 1839.

SIR: I send you a copy of my opinion, given upon the application of the administrator on the estate of the late purser Goldsborough, presented through purser Waldron, in January 1838. This opinion was given after the settlement of purser Goldsborough's accounts, in December 1837, and upon the production of the circular of the secretary of the navy of April 1, 1833, the existence of which circular

was not known to this office until a copy of it was produced by purser Waldron, in January 1838.

I also send you a copy of letters on the same subject addressed by me to the secretary of the navy, on the 9th of November 1838, to which I have not received any reply, nor am I advised that any action has been had thereon. From these two papers you will perceive my opinion in regard to the legality of the claims of those acting pursers, who hold no other office, to commissions, under the regulations referred to in my letter to the secretary.

I am gratified that the subject is now before the judiciary, and have to request that it may there be fully examined, without any regard to my opinion, so that the question may hereafter be considered wholly at rest. I also send you a letter of this date, from the fourth auditor, relating to the disallowance of \$154 91, referred to in your letter to the solicitor of the treasury.

I am, sir, very respectfully, your obed't servant,

ALBION K. PARRIS,

Comptroller of the Treasury.

NATHANIEL WILLIAMS, Esq., U. S. District Attorney,  
Baltimore.

P. S. I find, on examining the records, that the \$1248 10 was disallowed by the comptroller in the account settled *December* 1837, and that the account settled January 1839, was admitted, as stated by the auditor, without alteration. I make these remarks in explanation of my letter of yesterday, which was written in haste, without opportunity of reference to records.

A. K. P.

The defendant moved the court to instruct the jury that if they should find from the evidence that Charles Goldsborough, the defendant's intestate, was an acting purser on a foreign station, in the employment of the United States, at the time the disbursements mentioned in the said account were made, and that he died before his appointment of purser was confirmed, and that he held no other naval office than

that of acting purser, that he was entitled to charge 2½ per cent. commission on the said disbursements.

The district court refused to give this instruction, but instructed the jury that the defendant's intestate was entitled to one per cent. on the amount of disbursements made by him in the service and on the station mentioned.

To this instruction exception was taken by the defendant, and the case was brought into the circuit court, where it was argued, and the following opinion was delivered by

TANEY, C. J. This cause is brought here by writ of error from the district court. The point to be determined is, whether an acting purser in the navy, who held no other naval office at the time, is entitled to 2½ per cent. commission, upon the money disbursed by him for the government.

It is admitted, that this allowance is not given by any act of congress. It is claimed under a regulation of the navy department; it is, in express and positive terms, allowed in a regulation issued by the secretary of the navy in 1832; and this regulation is repeated, so far as concerns acting pursers holding no other naval office, in a circular instruction from the navy department, dated April 1, 1833. The services in question were performed in 1835-1836, and no regulation or order has ever been issued from the navy department revoking the allowance before mentioned; if, therefore, the department had the power to make these regulations, it is very clear that the plaintiff in error is entitled to the allowance he claims.

There are, certainly, cases in which the compensation to a person employed in a public service may be determined by the president or the head of a department; several cases of this description are mentioned in the opinions of the supreme court, in the cases of the United States v. McDaniel, United States v. Ripley, and United States v. Fillebrown, reported in 7 Peters' Supreme Court Reports, which have been referred to in the argument. In some instances, the power is expressly given by act of congress,

as for example, in the act of 3 March 1809, ch. 95, and in the act of April 1814, ch. 143, both of which have been cited in this discussion. But where an act of congress declares that an officer of the government or public agent, shall receive a certain compensation for his services, which is specified in the law, undoubtedly, that compensation can neither be enlarged nor diminished, by any regulation or order of the president, or of a department, unless the power to do so is given by act of congress.

In the case before me, the commission is claimed as a part of the compensation, to which the deceased was entitled as acting purser, for services rendered in the ordinary line of his official duty. Now the compensation to a purser for services of that description, is fixed by the act of congress of 18 April 1814, ch. 143, which declares that a purser shall receive \$40 per month, and two rations a day; it is the same compensation which was given by the acts of 17 March 1794, ch. 12, sect. 6, and 1 July 1797, ch. 7. And when the law declares that, for certain services, he shall receive \$40 per month and two rations per day, by what authority can the head of a department allow him more? The same act of congress, and the same section, that fixes the compensation of a purser, fixes also the compensation of lieutenants, chaplains, sailing masters, surgeons and various other officers in the navy, by giving them a certain sum per month, and a certain number of rations per day. It never has been supposed, that the secretary of the navy was authorized to increase the compensation of these officers, by enlarging their monthly allowance, or adding to the number of their daily rations; and when the compensation to the purser is fixed by the same law, and in language precisely the same, how can his case be distinguished from that of the other officers named in the law? How can the secretary increase his compensation by enlarging his monthly allowance, or adding to the number of his daily rations? And if he cannot do it in this mode, by what authority, or upon what distinctions,

can he do it, in the shape of commissions, when no such commissions are given by law? The court can see no ground whatever for distinguishing the case of a purser from that of any other officer mentioned in the act of congress; and as the department is bound by the allowance fixed for them, it is equally bound by that fixed for a purser.

Indeed, the objection to the allowance is made still stronger, by the provisions of the second section of the act of 1814, which authorizes the president to make an addition, not exceeding twenty-five per cent., to the pay of the officers, petty officers, midshipmen, seamen and marines engaged in any service, the hardships or disadvantages of which shall, in his judgment, render such an addition necessary. The power given to make this addition, by necessary implication, excludes the power of making any other or greater addition, or under any other circumstances, than those mentioned in this section; and if such a power could have been supposed to exist, in cases where the law merely fixes the compensation, and says nothing further, yet the well-established rules for the construction of statutes, would exclude it in the present case.

It has, however, been argued, that a purser is neither a commissioned officer nor a warrant officer, and is not so regarded in the navy, and that, therefore, the provisions in the second section of the act of 1814, do not apply to him. In other words, it is insisted, that the purser does not come within the description of an *officer*, and, consequently, is not included in the number of persons to whom the president is authorized to make the limited increase of compensation specified in the section.

It would be a sufficient answer to this argument to say, that the compensation of the purser is, undoubtedly, specified in the law, and he is, therefore, within the general principle before stated. But the second section applies to the allowance claimed in this suit, with as much force as it would to the increase of the pay and emoluments of any other officer mentioned in the first section; for, whether

a purser is regarded in the navy as a commissioned officer, or a warrant officer, or neither, it is very certain, that he is always included under the description of an *officer*, in the acts of congress which fix his compensation. Thus, in the act of 27 March 1794, ch. 12, the sixth section declares, "that the pay and subsistence of the respective *commissioned and warrant officers*, be as follows;" it then proceeds to specify their compensation, from the captain down, and the *purser* is mentioned among them.

The same language is used in the act of 1 July 1797, ch. 7, sect. 5, and again in the act of 1814 itself, showing clearly that the purser is embraced in the law, under the description of an *officer*, and consequently, that the restricted power given to the president, to increase the pay of an officer to a certain extent, under certain circumstances, applies to him as well as to the other officers named in the law, and therefore, carries with it the implied prohibition already mentioned, in his case, as well as in that of other officers. It is, by necessary implication, an implied prohibition to the executive, to add anything to the purser's compensation, greater than the amount specified, or under different circumstances, from those mentioned in the law.

It has been urged, that Mr. Goldsborough was an acting purser only, appointed by the commander of the ship, when abroad, to supply the place of the regular purser, who died when the ship was in a foreign port, and that the case of an acting purser is not provided for by any act of congress, nor his compensation fixed.

The regulation of the navy department of 1 April 1833, hereinbefore mentioned, would seem to countenance this distinction; but it can have no solid foundation. By the established usage and practice of the navy, sanctioned by the inferences which may justly be drawn from the legislation of congress upon this subject, the commanding officer may appoint a purser to his ship, when the purser regularly appointed dies while the ship is abroad. The party thus appointed is lawfully in office, and authorized to perform



the duties which belong to it, until the ship returns to this country, unless he is superseded by the appointment of some other person. Being lawfully in the office, and authorized to perform its duties, he is entitled to the compensation which the law has provided for such service, and to nothing more. This is the case of all appointments *ad interim* to offices on shore; and there is no reason why there should be a different rule in relation to the navy, nor a special rule in relation to a purser; the acting purser is nothing more than a purser *ad interim*, holding the office by an appointment which is temporary in its nature, and intended only to last until the office is regularly filled by a permanent appointment, made by the president.

If it should be said, that the commanding officer of the ship had no lawful authority to make an appointment *ad interim*, and that Mr. Goldsborough, therefore, was never regularly and lawfully in the office of purser, it would not strengthen the claim of the plaintiff in error to the allowance in question; for if he was not regularly in office, and rendered public service without any lawful authority to do so, then he must look to congress for remuneration, and not to the department.

It is true, that at the time these services were performed, the navy department claimed the right to make this allowance; this is abundantly proved by the regulations of 1832 and 1833, hereinbefore referred to; and at the time the appointment in question was accepted, and the services performed, Mr. Goldsborough, undoubtedly, supposed that he was entitled to the commission now claimed, in addition to the compensation mentioned in the act of congress. But the mistake of the secretary of the navy, or of the party interested, cannot alter the law upon the subject.

The construction given to the act of congress by the navy department, and the long and uninterrupted practice conforming to that construction, must certainly be considered and respected by the court; yet, the construction of the

navy department, and the practice under it, cannot be allowed to alter the law, nor to control its construction in a court of justice. But in this case it is not suggested, that there is any act of congress which can be construed to sanction this allowance of  $2\frac{1}{2}$  per cent.; and the power is claimed under the authority of usage, independently of any legislation upon the subject. Now, a usage, which would authorize the secretary of the navy to allow this commission, would, in effect, be a power not to expound, but to repeal the act of congress; for it would allow him to dispose of the public money in opposition to the true construction and meaning of the act, by giving the officer a higher salary than the law authorized; no usage or practice can warrant such a principle. As the case now stands, it is the duty of the court to expound the law, and to disallow the credit in question, unless Mr. Goldsborough is lawfully entitled to it; and in performing this duty, the court can recognise no right which is in opposition to the true construction of the act of congress; if the mistake of the department, and the expectations and belief of Mr. Goldsborough as to the extent of his compensation, at the time he accepted the office, furnish any equitable grounds for the allowance of this commission, it is an equity, upon the sufficiency of which congress must judge, and not the court. The exercise of a power, not warranted by law, by the head of a department, cannot create such an equity against the United States, as will be recognised and enforced in a court of justice.

The act of congress of 3 March 1809, ch. 95, is supposed, by the district attorney, to bear upon this subject, and its construction has been much discussed in the argument of the case. The district court was of opinion that the office of purser was embraced in the provisions of this law, and that Mr. Goldsborough, under it, was entitled to a commission of one per cent. upon the payments made by him for the United States, and he received that credit in the judgment pronounced by the district court; but

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after a very careful examination of that law, I am satisfied that it does not apply to the office of purser, and on this point I must differ from the court below. Entertaining this opinion, it is unnecessary to speak of the construction of the act of congress in relation to the cases embraced by it.

In my judgment, Mr. Goldsborough, while he acted as purser, was not entitled to any per-centage upon the money disbursed for the government; his compensation from the public was \$40 per month and two rations per day, and nothing more; but in addition to this, he had a right, in his transactions with individuals, to the profits and advances authorized by the regulations of the navy department. These last-mentioned regulations are, unquestionably, consistent with the law creating the office of purser, and warranted by it, and were, therefore, lawfully issued by the secretary, and are binding upon the parties concerned.

In this view of the subject, the plaintiff in error has obtained in the district court a credit of one per cent. on his disbursements for the public, to which he is not entitled; but the United States acquiesced in the decree, and no writ of error has been brought on their part. The judgment of the district court must, therefore, be affirmed.

*R. N. Martin*, for plaintiff in error.

*N. Williams*, District Attorney, for defendant in error.

CHARLES W. KARTHAUS

vs.

WILLIAM FRICK, Collector.

The charge of a specific duty upon an article in a particular form or vessel, is a charge upon the whole article, as described, including the *vessel* or *material* described as containing it.

The act of congress of 10th February 1820, has no connection with the tariff act of 1832, and cannot affect its construction.

The tariff act of 1832, in imposing a specific duty upon salt of 10 cents per 56 pounds, did not intend that the *sacks* in which the salt is imported, should be subject to an additional *ad valorem* duty.

The court cannot undertake to infer such an intention, merely because the relative value of the sacks, compared with the salt they contain, is much larger than that which the vessel or outside wrapper usually bears to the merchandise imported in it.

Circuit Court, April Term, 1840.

This was an action, instituted on the 6th of April 1840, against the collector of the port of Baltimore, to recover back certain duties paid under protest. The facts are stated in the opinion of the court, which was delivered by

TANEY, C. J. The question in this case arises under the act of the 14th of July 1832, in relation to the duty on salt. The seventeenth clause of the second section imposes the duty in the following words: "*On salt, ten cents per fifty-six pounds.*"

It appears from the evidence, that for the last ten or twelve years, and perhaps longer, Liverpool salt has been imported altogether in bags, or sacks, containing four bushels of salt; that coarse salt is imported sometimes in sacks, and sometimes in bulk, but that Liverpool salt, which is fine salt, is never imported otherwise than in sacks; and that this has been the usage of the trade for the time above mentioned. The sack of salt is worth about \$2 wholesale, and about \$2.25 by retail; and the sack itself

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when emptied and washed, is worth from 25 to 37½ cents, and when the material of which it is made is very good, a bag has sometimes been sold for 50 cents.

The construction given to the law of 1832, at the custom-house of this place, at the time of its passage, was, that all salt paid the specific duty above mentioned, and that the bags in which the fine salt was imported, were merely used as receptacles for the salt, like bags containing coffee, or hogsheads or barrels containing sugar or liquors, and that no duty was charged upon them.

In the last year, however, a different rule was adopted by the treasury department, and the collector, under instructions from Washington, now charges an *ad valorem* duty on the sacks, as manufactures of hemp, in addition to the specific duty charged upon the salt. The plaintiff having received a quantity of salt, in the usual mode, from Liverpool, was charged with duty on the bags as above-mentioned, and having paid the amount claimed, under protest, has brought this suit to recover it from the collector.

It appears from the clause in the law above quoted, imposing this duty, that no difference is made in the amount of it, whether the salt is imported in bulk or in bags. It is, moreover, a specific duty of ten cents upon the *fifty-six* pounds, without any reference to the value of the article. Inasmuch as it was the established custom, at the time this law was passed, always to import the fine salt in bags, congress must be presumed to have been fully apprised of it, and to have legislated with a full knowledge of the usual course of trade.

The material in which merchandise is usually packed for the purpose of secure and convenient transportation, has not, in general, been the subject of a separate impost. When the vessel containing the article is also a subject of commerce, the specific duty has been made higher upon the merchandise thus imported, in consideration of the value of the vessel that contains it; but we are not aware of any instance in which a separate *ad valorem* duty has been laid

upon the vessel or receptacle in which it is contained, when a specific duty is laid upon the merchandise. Thus, for example, in the twenty-third clause of the second section, the red wines of France, in casks, are charged with a specific duty of six cents per gallon; white wines, in casks, ten cents per gallon, and all French wines, in bottles, 22 cents per gallon. The duty, it will be observed, in this clause, is laid upon the wine in the bottles, and not upon the bottles containing it; but in the twenty-first clause of the same section there is also a specific duty upon bottles; yet it has never been supposed that, in addition to the duty imposed upon the wine imported in bottles, the separate duty imposed upon the bottles in the twenty-first clause was also to be levied.

So, in the case before us, if the law had said, "upon salt imported in sacks, and upon salt imported in bulk," ten cents per fifty-six pounds, it would have been evident, that the sacks were not liable to an additional duty as manufactures of hemp, for the same reason that bottles do not pay a duty, in addition to that imposed upon the wine imported in them. The charge of a specific duty upon an article in a particular form or vessel, is a charge upon the whole article as described, including the vessel or material described as containing it.

It is true that, in this case, the law does not, in express terms, say, that the duty of ten cents per fifty-six pounds is imposed upon *salt in bags*, and *salt in bulk*: but at the time the law was passed, it was the established course of trade to import fine salt in sacks; and as the duty is imposed generally upon every fifty-six pounds of salt, it must be understood to mean salt imported in the manner then usual, and, consequently, to refer to salt in bags as well as in bulk, and receive the same construction as if both modes were expressly mentioned.

It has been suggested, that the act of 10 February 1820, is to be taken in connection with the provision now in question in the act of 1832; that by the eighth section of

the first-mentioned law, the value of the articles subject to a specific duty is to be ascertained in the same manner as the value of imports subject to duty *ad valorem*; that this provision is to be taken in connection with the fifteenth section of the act of 1832, which declares that in ascertaining the *ad valorem* duty, "all charges except insurance," shall be added to the value of the goods; and as the sacks would have been added as a part of the charges, if the duty on salt had been an *ad valorem* duty, it is contended, that they ought still to be added, by virtue of the above provision in the act of 1820.

We do not perceive any ground upon which this act can be supposed to be entitled to any influence on the question before us. It has no connection whatever with the imposition of duties upon goods imported, and does not relate to that subject; its object is, to provide for obtaining accurate statements of the foreign commerce of the United States, and is so declared in its title; the tenth section provides that the value of the imports, into the United States, shall be estimated according to their value at the foreign ports from which they are imported, and not at their value in this country; and the eighth section, referred to as above, merely adopts the same rule to ascertain the value of the goods imported, which are liable to specific duties. The great object of that law is, to obtain an accurate statement of the nature, quantity and value of our various exports and imports; and not to regulate the duty upon them. Indeed, if this supposed connection could be made out between the act of 1820 and the tariff law of 1832, and if the eighth section of the former could have the effect claimed for it, upon articles subject to specific duties, the same process of argument would make it operate upon goods declared to be free, and make them chargeable with an *ad valorem* duty; for the seventh section of the act of 1820 contains the same provision, in relation to free goods, that the eighth section does in relation to those charged with specific duties. But it is evident that the

act of 1820 has no connection with the act of 1832; that the former was passed for a purpose entirely different from that of the latter; and that neither of the sections above-mentioned has any concern with the amount of duty to be paid by merchandise of any description, nor with the mode or the principles by which that amount is to be calculated or ascertained.

It is certain, that the relative value of the sack or material, in which the merchandise is, in this case, imported, is unusually large; the bag bears a far less relative value to the coffee which it contains, and so does the hogshead to the sugar, and the cask to the wine imported in it. But, whether upon account of this large relative value, policy requires that an *ad valorem* duty should be imposed on the sacks containing fine salt, in addition to the specific duty imposed on the article itself, is a question upon which congress has the right to decide; we can do nothing more than judge of their intention, by the laws they have passed on the subject. In no instance has congress imposed a duty on the vessel, material, or outside wrapper or package, in which merchandise was imported, charged with a specific duty; and in this case, they have used no language indicating any intention on the part of the legislature, to adopt a different rule in relation to salt imported in sacks. The court cannot undertake to infer such an intention, merely because the relative value of the sacks, compared with the salt they contain, is much larger than that which the vessel or outside wrapper usually bears to the merchandise imported in it; the influence which this circumstance should have, is a question for the legislature, and will not authorize the court to distinguish this article from the vessels and outside wrappers or packages of other imported merchandise.

If there was any reason for supposing that the salt was packed in bags, in order to introduce them, as an article of commerce, duty free, it would present a very different question; but nothing of that sort is suggested, nor is there



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the least evidence to create a suspicion, that anything unfair is intended in this mode of importation. The trade in fine salt is evidently carried on as it was before the tariff act of 1832; and it is imported in bags, because it is found to be most suitable, in that form, for sale, and for transportation from place to place. The sacks do not appear to have ever been regarded as things out of which a profit was expected, and there is never any regular market price for them; they are sold like sugar-hogsheads, and other casks, for the best price that can be gotten, as occasional opportunities may offer.

In our judgment, therefore, these sacks are not liable to be charged with the *ad valorem* duty now demanded; we think the construction heretofore given to the act of 1832, in relation to this subject, is the true one, and that the opposite construction, more recently adopted, cannot be sustained. As the duties in question were paid under protest, the plaintiff is entitled to recover back the amount of the money so paid by him.

*Charles F. Mayer*, for plaintiff.

*N. Williams*, District Attorney, for defendant.

SAMUEL RIGGS AND GEORGE PEABODY

vs.

WILLIAM FRICK, Collector.

In an action against the collector of the port of Baltimore, to recover certain duties paid, under protest, upon hearth-rugs, under the act of 14 July 1832, it being admitted that worsted is made out of wool by combing, and thereby becomes a distinct article, well known in commerce under the denomination of "worsted," and that the hearth-rugs in question were made entirely of worsted, except that linen threads were used to sew together certain portions of them: *held*, that the said rugs were not chargeable with duty as "manufactures of wool," or "of which wool is a component part," under that act.

If such rugs were, at the time of the passage of the act of 2 March 1833, ch. 944, well known in commerce by the denomination of "worsted stuff goods," they were entitled to be admitted to entry, free from duty.

But if they were not so then known, they were liable to the duty of fifteen per cent. *ad valorem*, imposed by the 25th clause of the second section of the act of 1832, as a non-enumerated article.

The rugs, as worsted goods, were not liable to cash duties, but the importers were entitled to a credit of three and six months, as provided in the fifth section of the act of 1832.

Circuit Court, April Term, 1840.

This suit was instituted by the plaintiffs, on the 7th of April 1840, against the collector of the port of Baltimore, to recover back certain duties upon an importation of hearth-rugs, paid by them in cash, under protest.

The following admitted statement of facts was filed in the case:

In this case, it is admitted, that the plaintiffs imported into the port of Baltimore, in the ship *Lelia*, from Liverpool, in the month of March 1840, ——— cases of goods composed of worsted and cotton exclusively; it is also admitted, that worsted is made out of wool by combing,

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and becomes a distinct article, known in commerce under the denomination of worsted; the duty upon which amounted to \$1419 10; that the plaintiffs tendered a bond, with approved security, for their whole importation by this vessel, including these goods, at three and six months' credit, and continues to tender the same, but the collector refused, and refuses to take such bonds, and insisted upon cash being paid, which was paid on the 28th March, under protest.

All errors in pleading are waived; this suit being instituted to try whether the duties are cash, or upon a credit.

At the trial of the cause, the following instructions and remarks were given to the jury by—

TANEY, C. J. 1. It is admitted, that the hearth-rugs in question are made entirely of worsted, except that linen threads are used to sew together certain portions of them; and also that worsted is made out of wool by combing, and thereby becomes a distinct article, well known in commerce under the denomination of worsted; it is also admitted, that the rugs were charged with duty as manufactures of wool, and that the duty charged was paid by the plaintiffs, with a protest against the legality of the charge. It was decided by the supreme court, in the case of *Elliott v. Swartwout*, that goods made of worsted are not manufactures of wool, or of which wool is a component part, within the meaning of the words "all other manufactures of wool, or of which wool is a component part," in the second article of the second section of the act of congress of 14 July 1832. This decision is conclusive upon this part of the controversy, and the court therefore instruct the jury that the rugs in question are not chargeable with duty, as manufactures of wool, or of which wool is a component part.

2. If the jury find from the evidence that the hearth-rugs in question were at the time of the passage of the act of congress of 2 March 1833, ch. 944, well known in commerce by the denomination of "worsted stuff goods,"

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then they were entitled to be admitted to entry, free from duty, and the plaintiff is, in that case, entitled to recover back from the defendant the whole amount of the duty he has paid.

3. But if the jury find that the rugs, at the time above mentioned, were not generally known in commerce as "worsted stuff goods," then they are liable to the duty of fifteen per cent. *ad valorem*, imposed by the twenty-fifth clause of the second section of the act of 1832, as a non-enumerated article; and the plaintiffs are entitled to recover back the difference between that amount of duty and the sum paid to the defendant.

It appears from the statement of facts, that there is no controversy in relation to the amount of duties charged in this case; the whole dispute is confined to the time of payment. The collector, under the instructions he has received from Washington, insists that the duties upon these goods were payable in cash, and the importers, the plaintiffs in the case, contend that they were entitled to a credit of three and six months.

The goods in question were composed of worsted and cotton, and the duties have been charged according to the third clause of the second section of the act of 14 July 1832, which imposes a duty upon all manufactures of cotton, or of which cotton shall be a component part. The duties have been thus charged upon the distinction between "worsted stuff goods" and "woollen goods;" for if it was supposed these goods were "*a manufacture of wool, or of which wool shall be a component part,*" in the sense in which these words are used in the act of congress, then the duty charged might have been a much higher one than that exacted; it must have been calculated according to the *second clause* of the second section, and not according to the *third clause*.

As both parties admit that the duties have been rightfully charged, as respects the amount, it is unnecessary to examine particularly that part of the subject. The dis

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tion between "worsted goods," and "woollen goods," has been long established and understood in commerce, and has been preserved in the tariff acts of 1832 and 1833. In the first-mentioned act, a great difference was made between the rate of duty imposed upon "worsted stuff goods" and upon "manufactures of wool;" and in the act of 1833, the former were made entirely free, while the latter remained subject to the heavy duty imposed by the act of 1832. In the case of *Elliott v. Swartwout*, 10 Peters 152, the supreme court recognise this distinction, and remark that, "if, because worsted is made of wool, all manufactures of worsted become woollen manufactures, there would be no propriety in enumerating worsted goods as a distinct class." It follows, from the construction of these acts, as given by the supreme court, that although a part of the fabric now in question was composed of worsted, yet that did not make it a manufacture of which wool is a component part, within the meaning of the act of 1832, and consequently, it was not liable to the duty on woollens; and worsted being free from duty, the collector properly charged them as manufactures of which cotton is a component part.

But the construction thus given to the law by the officers of the government, in relation to the amount of the duties charged, is inconsistent with the claim made for the payment of these duties in cash. If the goods are regarded as manufactures of wool, they must pay the high duty on goods of that description; but they have not been so regarded, and have not been charged with the impost laid upon all manufactures "*of which wool is a component part.*" If they are not considered to be woollen, for the purpose of ascertaining the amount of the duty to be collected, how can they be treated as woollen, in determining the time of payment? They are not liable to the cash duty, unless they are manufactures of wool, or of which wool is a component part; and if they are chargeable with the cotton duties, the importers are entitled to a credit of three and six months.

The description of the goods which are to pay the woollen duties, and of the goods which are to pay cash duties, are precisely the same. The second clause of the second section of the act of 1832, among other things, provides that the duty upon "manufactures of wool, or of which wool shall be a component part," shall be fifty per cent. *ad valorem*; the fifth section declares that "*except wool, manufactures of wool, or of which wool is a component part,*" when the amount of duties exceed two hundred dollars, they are payable at the option of the importer, one-half in three and the other half in six months; and the sixth section provides that upon "*manufactures of wool, or of which wool is a component part,*" the duties shall be paid in cash. Now, if these goods are not "*manufactures of wool, or of which wool is a component part,*" within the meaning of the second clause of the second section above quoted, which regulates the amount of duty, how can they be regarded as manufactures of that description, within the meaning of the fifth and sixth sections above mentioned, which regulate the times of payment? The language of all these clauses of the law evidently describes the same goods. And if the goods in question are not chargeable with the woollen duties, it follows that the duties upon them are not payable in cash.

It has been said in the argument, that the sixth section of the act of 1832, in requiring the payment of cash duties on woollen goods, makes no distinction between manufactures of *combed* wool and of *carded* wool, and that woollen goods of both descriptions are, therefore, chargeable with the cash duties. If this argument is sound, and this the true construction of the sixth section of the act, the same construction must also be given to the second clause of the second section, and if cash duties are demandable, on the ground that the goods in question are manufactures of which wool is a component part, then the full amount of the woollen duties ought to have been charged at the custom-house. But when it is admitted, that these fabrics are not chargeable with the woollen duties, how is it possible to subject them

to the cash payments, which apply exclusively to the woollen goods?

It is suggested on the part of the United States, that the tariff act of 1832, makes no distinction in the sixth section between articles manufactured of combed wool or of carded wool. But it must be remembered also, that no such distinction is made in the second clause of the second section; and if the omission of this distinction ought to influence the decision in relation to the time of payment, it ought to have had the same effect in fixing the rate of duties.

But neither of these terms, "*combed wool*" or "*carded wool*," is used in any part of the law, in describing the manufactures therein mentioned; the distinction taken in the act of congress is between "*worsted*" and "*woollen*." Although *worsted* is made of combed wool, yet we have seen nothing that would justify us in concluding that all manufactures of combed wool are *worsted*; on the contrary, for aught that appears to the court, there may be a variety of manufactures of combed wool which are not *worsted*, and which would be liable to the duties imposed on *woollens*. But the component part of these goods, which has given rise to this controversy, is not only made of combed wool, but is "*worsted*;" and it must be dealt with accordingly, not only in relation to the amount of duties, but also in the times of payment.

Upon the whole, we think the goods in question were not liable to cash duties; and that the importers are entitled to the credit of three and six months, as provided in the fifth section of the act of 1832 hereinbefore mentioned. And as the amount was paid under protest, and the importers tendered at the time, and now tender, a bond to secure the duties according to law, they are entitled to recover from the collector the amount paid, with interest from the day of payment.

*R. Johnson*, for plaintiffs.

*N. Williams*, District Attorney, for defendant.

ISAAC KNIGHT

vs.

BALTIMORE AND OHIO RAILROAD CO.

A patent is *prima facie* evidence that the patentee is the inventor of the improvement described, and casts on persons infringing it, the burden of proving that such improvement was not the invention of the patentee, or that it was in public use before he applied for a patent.

The patentee cannot recover damages for the infringement of his patent, unless the jury find his improvement to be useful, and of some value.

The original patent may be surrendered, and a corrected one taken out, for the purpose of giving a more perfect description of the invention intended to be claimed in the original patent, or for the purpose of narrowing the claim, so as to leave out parts of the machinery claimed as new in the first patent, and afterwards found to be the invention of others: provided, the error arose from inadvertence or mistake, and was attempted to be corrected within a reasonable time after its discovery.

The improvement intended to be described in the re-issued patent must, in principle and mode of operation, be substantially the same with the one intended to be described in the original patent.

It is not necessary to include, in the re-issued patent, all of the improvements claimed by the patentee, and to which he may have been actually entitled under the original patent.

Circuit Court, November Term, 1840.

This action was brought to recover damages for the infringement of a patent. The original patent issued in the year 1829; a corrected one was issued in the year 1834, and a further correction was made, and a new patent issued, in the year 1836.

The facts of the case are sufficiently detailed in the instructions to the jury, which were delivered by—

TANEY, C. J. 1. In the patent of 1829, the plaintiff claims to have invented improvements, consisting of (1st) the application of friction wheels or rollers to the axles of railway carriages; (2d) in the mode of applying them; and



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(3d) in the construction of the body and other parts of the carriage; and he claims, as new, the combination described in each of these three improvements, as well as the combination of the whole machine.

2. The improvement which is described in the specification, in the following words, is claimed as new: "And in order to get rid of the lateral friction, caused by the collars or shoulders of the axles, the ends of all the axles to be reduced to a point, and plates of steel so fixed, either in a frame, or on the sides of the carriage, as that the ends of the axles would work at a point against those plates; by which arrangement we avoid nearly all the friction occasioned by collars in the common way, and perhaps, some of that produced by the flanges of the road-wheels against the side of the rails; and in order to enable this improvement to be applied to the curvatures of the road, there must be left sufficient room for the main axles to play within these collars, and also between the small rollers."

The patent is *prima facie* evidence that the plaintiff was the inventor of the improvement therein described, and casts on the defendants the burden of proving that such improvement was not the invention of the plaintiff, or that it was in public use before he applied for a patent. But the plaintiff is not entitled to recover, unless the jury find his improvement to be useful, and of some value.

3. The plaintiff, at the time of his application for the patent of 1834, had a right to surrender the patent of 1829, and take out a corrected one, if the said patent was invalid, either by reason of the defective description of the improvement, or by reason of his having claimed, as new, more than he was entitled to; provided, the error had arisen from inadvertence or mistake, and the plaintiff proceeded to correct it within a reasonable time after it was discovered.

4. The plaintiff was not entitled to the patent of 1834, except for the purpose of giving a more perfect description of the invention intended to be claimed by him in the

patent of 1829, or of narrowing his claim, so as to leave out parts of the machinery claimed as new in the first patent, and which he afterwards found to be the invention of others; and the plaintiff cannot recover in this suit, if the end-bearing (for the purpose of destroying the lateral thrust) intended to be described in the patent of 1834, is not, in principle and mode of operation, substantially the same improvement with the one intended to be described in the patent of 1829. But the plaintiff was not bound to include in the patent of 1834, all of the improvements, which he claimed, and to which he may have been actually entitled under the patent of 1829.

5. The patent of 1829 having been cancelled, when that of 1834 was granted, the subsequent patent of 1836, upon which this suit is brought, is not valid, unless the improvement described in it is, in its principle and mode of operation, the same with that intended to be described in the patent of 1834, differing from it only in giving a more perfect description of the improvement intended to be secured by that patent, or in rejecting something before included as new, which was found to be old. The plaintiff was not entitled, in the patent of 1836, to enlarge, change or modify the improvement intended to be patented by the patent of 1834.

6. The plaintiff is not entitled to recover, unless he is the original inventor of the improvement described in the patent of 1836, and unless that improvement is the same, in principle and mode of operation, with the one intended to be described in the patents of 1834 and 1829; nor was he entitled to surrender the patents of 1829 and 1834, in the manner above-mentioned, unless the errors of each of them arose from inadvertence, accident or mistake, nor unless he proceeded to correct such error within a reasonable time after he discovered it. But the patent of 1834 is *prima facie* evidence that the patent of 1829 was lawfully surrendered, and the new one granted; and so also, the patent

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of 1836 is *prima facie* evidence that the patent of 1834 was lawfully surrendered, and that of 1836 lawfully granted.

7. The public use of end-bearings, for the purpose of transferring friction from the shoulders to the ends of axles, in a cotton-mill or other stationary machinery, before the patent of 1829, as described in the testimony, will not render the plaintiff's patent void, provided the jury find that he was the original inventor of the combination he claims, in relation to railway carriages, and that his invention is useful in the transportation of burdens and passengers on railways. But if, before his first patent was obtained, the same principle, in the same combination, which he describes as his improvement, was in public use, in ordinary carriages, upon common roads, the plaintiff was not entitled to a patent for applying the same thing to railway carriages, unless the improvement he claims contain something new and material, either in principle, in combination, or in the mode of operation, in order to adapt it to its new use.

8. The defendants are not liable to this action, unless they have used the plaintiff's invention, or one substantially the same in principle and mode of operation, since the date of the patent on which this suit is brought; and if the jury find for the plaintiff, he is entitled to damages for the use of his invention, from that time until the commencement of this suit, but he is not entitled to damages for any use which the defendants may have made of this invention, before the date of the patent of 1836.

Verdict and judgment for the plaintiff for \$5000.

*J. Meredith, John Nelson and C. F. Mayer*, for plaintiff.

*R. Johnson and J. H. B. Latrobe*, for defendant.

THOMAS C. LANE and ELLIOTT T. LANE

vs.

GEORGE BELTZHOOVER.

A *fiery facias* issued in the names of two plaintiffs, after one of them is dead, is irregular and defective; but such defect may be amended, under the authority given by the 32d section of the act of 1789, ch. 20, if the matter be regularly brought before the court.

Circuit Court, November Term, 1840.

TANEY, C. J. In this case, the plaintiffs obtained a judgment against the defendant, in 1829, which was regularly kept alive by proper process until July 13th, 1838, when the *fiery facias* issued which has given rise to this controversy. Certain property was seized by the marshal, under this writ, and sold 24th September, 1838; and at the November term following, and before the money was paid over by the marshal, the defendant moved to set aside the *fiery facias*, upon two grounds.

1. Because more than a year and a day had elapsed from the rendition of the judgment.

2. Because one of the plaintiffs was dead when the *fiery facias* was issued, and no suggestion thereof had been made upon the record.

The first objection I understand to be abandoned. It appears that process has been regularly issued, by which the judgment has been kept alive.

The controversy is on the second ground above stated. The point of this objection, as stated in the motion, is that the death was not suggested on the record; the substantial meaning of this objection, however, I suppose to be, that the execution issued in the names of both plaintiffs, when one was dead; because, if no process had been issued

on the judgment, it would be quite immaterial whether the death was suggested or not.

It is in this point of view, that the question has been argued in the notes filed in the case. It is admitted, that one of the plaintiffs died after judgment and before the *feri facias* in question issued; and from the cases referred to by the counsel for the plaintiff, in support of the *feri facias*, I understand him to insist: 1st. That the execution is good, and that both of the plaintiffs ought to have been included in it: 2d. That, if irregular, it may be amended.

In order to maintain the first proposition, Bing. on Executions 136, 161 (Law Lib. 58, 68), and 2 Tidd Pr. 1004, 1029, have been relied upon. But these passages, although stated in very general terms, must have been intended to be applied to those executions only, which issue before the succeeding term, and which, therefore, bear *teste* of the first day of the term in which the judgment was rendered, and before the death of the party; if the rule was intended to be stated more broadly than this, it cannot be supported upon principle, or by authority. In this case, from the practice originally adopted in this court, the *feri facias* bears *teste* on the first day of the preceding term of the supreme court, that is, on the second Monday in January 1838. The precise time of the death of Thomas C. Lane is not stated, but I collect from the manner in which the case is argued in the notes, that he died before the term above mentioned; if that be the case, the *feri facias* is certainly irregular, and could not be supported in its present form.

As to the second point to which authorities have been cited, it is proper to say, that no motion to amend has been made; the only motion before the court is to set aside the execution. But the authorities upon the right to amend having been referred to, I presume, that the counsel for the plaintiffs supposed that point before the court, and the court will, therefore, by leaving the case open until Mon-

day next, give the party an opportunity of presenting his motion in regular form. In the mean time, as the point has been argued, and as the court has no doubt upon the question, it seems better for both parties, to express at once the opinion already made up, rather than delay it until a final motion to amend is made.

The plaintiff, according to the English cases, would be entitled to amend, by suggesting the death of Thomas C. Lane on the record, and striking out his name from the *feri facias*, so as to make it issue in the name of Elliott T. Lane, as the surviving plaintiff. (5 T. R. 577; 2 Ibid. 737; 6 Ibid. 450.) But if the English doctrine upon this subject were more questionable, I consider the authority to amend such an error as this, to be clearly given by the act of 1789, ch. 20, sect. 32, which provides that the courts of the United States "may, at any time, permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion, and by their rules, prescribe."

In this case, there is undoubtedly a defect in the process of *feri facias*, because it issued in the names of both plaintiffs, long after one was dead; but that defect may be amended, under the authority given by the above-mentioned law, if the matter be regularly brought before the court.

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ROBERT W. ALLEN, JOHN HENDERSON AND JAMES S.  
WEDGE,

vs.

UNITED STATES.

In a suit, instituted by the United States in the district court, upon a bond given by the owners and master of an American vessel, under the seventh section of the act of 31st December 1792, conditioned for the proper use and delivery up of the certificate of registry granted to such vessel under that act, the breach relied upon was, that subsequently to the granting of

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such certificate, the vessel was sold to a foreigner, at Havana, but that the obligors in the bond did not deliver up said certificate of registry, as required by the act of 1792.

The defendants, in rebuttal, offered in evidence the record of a proceeding *in rem*, instituted by the United States against the vessel, in the district court for the southern district of New York, in which her condemnation was sought, for a violation of the acts of congress in relation to the slave-trade; by this record it appeared that the libel was dismissed, upon the ground, "that it appeared that the said vessel, when arrested, was not employed, or made use of, as a vessel of the United States, in transporting or carrying slaves from one foreign country or place to another, within the meaning or intent of the act of congress of May 10, 1800;" and she was accordingly ordered to be delivered up to the claimant, who, by the record, appeared to be a citizen of the United States, residing at Havana. This record was excluded by the district court, as inadmissible in the suit upon the bond: *held*, 1. That the record of the suit *in rem*, if admissible *at all*, for the purposes for which it was offered, must be *conclusive*; the act of assembly of Maryland of 1813, ch. 164, restricts only the conclusive effect of sentences *in rem* of *foreign* tribunals, and its application must be confined to them. 2. The record was properly excluded by the district court; the doctrine, that sentences of this kind are evidence against all the world, and binding, even upon those who are not parties, has been confined to *civil cases*, and even in them it is confined to those parties who have a direct or incidental interest in the suit; it has never been applied to criminal proceedings, or to suits for the recovery of penalties. The present suit, though a civil one in form, sounding in contract, is, in substance, an action for the recovery of a penalty, and has no connection with the proceeding in the admiralty.

Circuit Court, November Term, 1840. Error to the District Court.

TANEY, C. J. This case is brought here by writ of error from the district court. It appears by the record, that an action of debt was brought in the district court, by the United States against the plaintiffs in error, upon a bond for \$1200, dated 20 May 1839, given by them, under the act of 31 December 1792, sect. 7, for the proper use and delivery up of the certificate of the registry of the schooner Catharine, built in Baltimore in the year 1839, of which Robert W. Allen and John Henderson were the only owners, and James Swedge was, at that time, master. The

defendants pleaded, by consent, *nil debent*, upon which issue was joined, with leave to either party to give the special matter in evidence.

The breach relied on at the trial, in behalf of the United States, was, that after this certificate of registry was given, the vessel was sold at Havana, in the Island of Cuba, and was there purchased by a foreigner; that the master afterwards returned to the United States, in June or July 1839, but that the certificate of registry had not been delivered up, according to the directions of the act of congress. The suit was instituted on the bond, on the 12th October 1839, and the case was tried in the district court, at March Term, 1840. The verdict was in favor of the plaintiff for the penalty of the bond, and the judgment entered accordingly.

The defendants, in the district court, in order to rebut the evidence offered by the United States, and to show that the Catharine was not purchased, at Havana, by a foreigner, offered in evidence the record of a proceeding in the district court of the United States for the southern district of New York; by which it appeared, that an information had been filed in that court, on the 30th of December 1839, against the Catharine, and her condemnation prayed for by the district attorney of the United States, for a violation of the acts of congress in relation to the slave-trade. The libel charged various offences under the act of 22 March 1794, and it also charged that the said vessel, being wholly or in part the property of citizens of the United States, or of persons residing in the United States, was, on or about the 1st July 1839, employed by some person residing in the United States, in the transportation and carrying of slaves from some foreign country or place, to some other foreign country or place, contrary to the act of congress of 10 May 1800, which subjects vessels so employed to forfeiture.

To this libel an answer was put in, on the 27th March 1840, by Charles Ting, a citizen of the United States, residing at Havana, claiming the Catharine as his property,



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under a transaction at Havana, with the agent of the American owners, which he particularly details; and denying that the vessel, at the time of her arrest on the high seas (which he states to have been on the 8th of August 1839, after he had become the owner), was engaged in the transportation of slaves, as charged in the libel.

The case was submitted to the court upon this libel and claim, and after hearing counsel on both sides, the court adjudged "*that it appearing that the said vessel, when arrested, was not employed or made use of as a vessel of the United States, in transporting or carrying slaves from one foreign country or place to another, within the meaning and intent of the act of congress of 10 May 1800,*" it was therefore ordered, that the libel be dismissed, and that the vessel be discharged from arrest and delivered to the claimant.

The counsel for the United States objected to the admission of this record in evidence, and the objection was sustained by the court; whereupon the defendants in the court below excepted, and have brought the case to this court by writ of error; and the only question presented here is, whether the district court erred in refusing to admit this record, or any part of it, in evidence.

The counsel for the plaintiffs in error contend, that the proceeding in the district court of New York, being a proceeding *in rem*, the sentence of the court is evidence of the matters decided by it, when the same points arise in other courts; that the court expressly grounds its sentence upon the fact, that the vessel, at the time of her arrest, was not employed in the slave-trade, as a vessel of the United States; and that the sentence, therefore, decides her national character, as well as the nature of her employment. And it is insisted on the part of the plaintiffs in error, that this sentence is admissible, for the purpose of rebutting the evidence offered on the part of the United States; and in order to show that the Catharine had not been sold to a foreigner, at Havana, before she sailed on the voyage in

which she was arrested, but was the property of the claimant, Charles Ting.

It is proper here to remark, that if this evidence is admissible at all, to prove the facts above mentioned, it must be *conclusive*. This principle has been settled by repeated decisions in the supreme court, as the general rule of law in relation to sentences of this description; and the act of assembly of Maryland of 1813, ch. 164 (if it could, upon any ground, affect the rule, where two courts of the United States are concerned), is confined to the sentences of foreign tribunals, and restricts their conclusive effect, but does not propose to change the law in relation to the decisions of our domestic courts.

Now, the sentence relied on, as conclusive evidence, to show that the Catharine, when arrested, still retained her American character, is a sentence of acquittal. But yet it is evident, that a sentence of condemnation would have implied her American character far more strongly than a sentence of acquittal; for although it was certainly necessary, in order to condemn her, that the court should have been satisfied that she was owned by an American citizen, or by some person residing in the United States, yet it was by no means necessary to establish such ownership to entitle her to acquittal; and the argument on the part of the plaintiffs in error, if successful, would prove that the sentence of the district court of New York, whether it condemned or acquitted the vessel, necessarily involved and decided her national character, and showed it to be American. There must obviously be some fallacy in an argument which would lead to this result, and which would show that upon such a libel, and such a claim, the sentence of the court (no matter whether it was given the one way or the other) established conclusively, against all the world, that she was a vessel of the United States, so as to preclude inquiry upon that subject in any other court.

But the court thinks it very clear, upon the face of the proceedings and sentence, that the court of New York did

not acquit the Catharine, because it was satisfied that she was an American vessel; but because, in the judgment of the court, she was not engaged in the transportation of slaves. Indeed, from the language of the sentence, it might, perhaps, be inferred that she was acquitted upon the ground that she was not an American vessel. The language of the sentence is, that she was not employed, or made use of, "*as a vessel of the United States,*" in the transportation of slaves; and this language may be understood to imply that she was made use of for that purpose, but not as a vessel of the United States. The court may have been of opinion that, under the transaction stated by Ting, she had lost her American character, and become Spanish property, and therefore, not liable in our tribunals on account of her employment in the slave-trade. But whether the acquittal was upon the ground that she was not a vessel of the United States, or was not engaged in the slave-trade; yet, if she was not liable to condemnation, she would, of course, be delivered up to Ting, as no other claimant appeared before the court; and it appeared that the vessel, when arrested, was in his possession, and under his control and direction, either as owner or as agent for the owners. The sentence of acquittal, and the delivery to Ting, do not, therefore, affirm the property to be in him, nor the vessel to be American.

. But, if the American character of the vessel was necessarily involved in, and expressly affirmed by, the decision, yet, it could not have been received as evidence in the case before the court. The doctrine that judgments of this description are evidence against all the world, and are binding even upon those who were not parties to them, has always been confined to civil cases; and in civil cases, the rule is not universal, but is confined to those who have a direct or incidental interest in the condemnation or acquittal of the vessel libelled, and who may, therefore, if they choose, make themselves parties. In the case of *The Mary*, 9 Cranch 144, the supreme court (speaking of such sentences)

have said: "*they bind the subject-matter, as between parties and privies;*" and this, it seems, upon principle, must be the true application of the rule in civil suits. But the rule has never been applied to criminal proceedings, nor to suits for penalties; and it has been decided by this court, in the case of the *United States v. Montell* (*ante* 47), that a suit upon a bond of this kind, though in form, a civil suit and sounding in contract, is yet, in substance and reality, a suit for a penalty inflicted for an offence against the law; for which penalty surety is taken in advance from those whose misconduct may render them liable to punishment.

In the case of *The Mary*, above referred to, the sentence of the court of admiralty would not have been conclusive in a civil case, except between parties and privies to the suit against the vessel. But the case before the court is a suit to recover a penalty against the plaintiffs in error; and if the sentence of the district court of New York had declared that the *Catharine*, at the time of the arrest, was a Spanish vessel, owned by a subject of the Queen of Spain, and therefore, not liable to condemnation under our laws, though actually engaged in the transportation of slaves; would any one suppose that such a sentence would have been conclusive upon the plaintiffs in error, and have compelled them to pay this bond, without an opportunity of proving that the vessel had never been sold to any one after she had obtained her certificate of registry? Such a proposition would hardly be seriously pressed upon the court, yet the rule must be reciprocal; and if the present sentence (supposing it to be a direct affirmation of American ownership) would conclude the United States upon that point, a contrary affirmation would be equally conclusive upon the obligors in the bond. But the suit on the bond has no connection whatever with the proceedings in admiralty, in the district court of New York; nor is the matter in controversy here, in any respect, connected with, or dependent upon, those proceedings. It is a suit for a penalty, and the United States must, by tes-

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timony adduced here, prove that the penalty has been incurred; the parties charged have, undoubtedly, the right to adduce testimony, and to be heard in their defence; and are not and cannot be concluded by any decision made elsewhere, to which they were not parties, and in the issue of which they had no interest. The decision of the district court of New York, upon a proceeding against the vessel, for a violation of the law in relation to the slave-trade, cannot be evidence in a suit between different parties, brought to recover a penalty inflicted by a different act of congress, for the misconduct of the master in not delivering up her certificate of registry, as required by law.

The judgment in this case must, therefore, be affirmed.

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CITY BANK OF COLUMBUS

vs.

FARMERS' AND PLANTERS' BANK OF BALTIMORE.

Where a bank-note is taken in the usual course of business, *bonâ fide*, and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business, that it was lost by, or stolen from, the rightful owner, and was not the property of the person who then held it, the fact of its having been lost or stolen from the rightful owner, will be no defence to an action on the note brought by the person so taking it.

But such defence will be a good one, if the note were taken under circumstances which ought to have excited the suspicion of a person of ordinary prudence and caution, and led him to make inquiry before the note was taken by him.

Circuit Court, November Term, 1847.

*Plaintiff's Prayer.*

If the jury shall believe, from the evidence, that the plaintiff took the bank-note which is the subject of this action, for a valuable consideration, in the usual course of the plaintiff's business as a bank, fairly and *bonâ fide*,

without notice or knowledge that said bank-note had been lost or stolen, or that any former holder had been illegally dispossessed of it, then the plaintiff is entitled to recover.

*Defendant's Prayer.*

Where a bank-note is lost or stolen, a party who seeks to make title to it against the owner, must show, not only that he has given value for it, but also that he took it under circumstances which were not calculated to excite the suspicions, in regard to it, of a prudent and careful man.

TANEY, C. J. The City Bank of Columbus is entitled to recover in this action, if the bank-note in question was taken for a valuable consideration, in the usual course of its business as a bank, *bonâ fide*, and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business, that the note had been lost by, or stolen from, the rightful owner, and was not the property of the person who then held it.

But if it was taken under circumstances which ought to have excited the suspicion of a person of ordinary prudence and caution, and led him to make further inquiry, before the note was taken, then the bank took it at its peril, and is not entitled to recover.

Verdict for the plaintiff.

*J. Meredith*, for plaintiff.

*J. Mason Campbell*, for defendant.

## ROBERT COMLY

vs.

ALEXANDER FISHER, WILLIAM D. MILLER AND WILLIAM  
E. MAYHEW, JR.

Where the owner of a factory and store has his agent residing there, holding possession and carrying on the business in the name of his principal: *held*, that the possession of the agent is the possession of the principal.

If the principal assign the goods in such store and factory to the agent, though for a *bonâ fide* consideration, still such goods will be liable for the debts of the principal, unless the agent, in some manner, make known to the public, the change of possession, and that he no longer holds the goods as the property of his former principal, but in his own right.

If such sale be private, without witnesses, or visible change in the possession or ownership, it will be void as against the creditors of the vendor, until the change in the title, and the character of the possession, be so made known.

Where goods seized under an attachment, are proved not to be the property of the person against whom the writ is issued, the measure of damages, in an action against the attaching creditor, is the value of the goods, at the time they were attached, and such further damages, if any, as the jury may find was actually sustained by the plaintiff, by reason of the seizure.

In such an action, the amount of rent due on the premises, at the time of the seizure, and retained by the sheriff, to be paid to the landlord, ought to be deducted by the jury from the amount of their verdict.

Circuit Court, November Term, 1847.

This suit was brought, on the 25th January 1846, by Robert Comly, a resident of the state of Pennsylvania, to recover damages for seizing, taking and carrying away the plaintiff's goods. The defendants pleaded not guilty.

The facts of the case may be briefly stated as follows: Prior to the 25th April 1846, Samuel Comly, of Philadelphia, was the proprietor of Rockland factory, and of the store in which were the goods in question, at the time of

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their seizure; Robert Comly, the plaintiff, resided at the factory, and was in possession of the goods, and carried on the factory and store, as the agent and under the name of Samuel Comly. On the 22d of that month, Samuel Comly sold the factory and store to Thomas J. Folwell, who sold the same, on the same day, to Robert Comly, the plaintiff, and he continued the business under the old name. On the 5th of August following, the defendants, who were creditors of Samuel Comly, sued out a writ of attachment and seized, under said attachment, the goods in the store and the machinery in the factory, claiming the same as the property of Samuel Comly. The said defendants insisted that the sale by Samuel Comly to Folwell, and by Folwell to the plaintiff, was without consideration, and intended to hinder and delay the creditors of the former, and therefore void; and also that, inasmuch as these sales effected no ostensible change in the ownership of the property, the vendee having been, at the time, in possession thereof, as agent of the vendor, and no notice of such change of property having been given to the public, the same, even if an actual sale, would not affect the rights of the vendor's creditors, who had no notice thereof. At the time of the seizure under the attachment, the sheriff closed the factory and store, and the object of this suit was to recover, not only the value of the property seized, but also the damages sustained by the plaintiff in the breaking up of his business.

The following prayers were made to the court:

*Plaintiff's Prayers.*

1. If the jury find from the evidence that, on the 22d day of April 1846, Thomas J. Folwell, by purchase from Samuel Comly, for a fair and *bonâ fide* consideration, was entitled to the store, and the goods and effects therein, and to the machinery in the factory, at Rockland; and that, being so entitled, he took possession thereof, and on the same day, sold the same, fairly and *bonâ fide*, to Robert Comly, the plaintiff, who was then, and continued after-



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wards, in the possession thereof, claiming title to the same; and shall further find that, on the 5th day of August 1846, the goods and property mentioned in the schedule offered in evidence, were seized by the sheriff of Baltimore county, by the authority, or under the direction, and with the consent of the defendants; and that the said goods and property were taken possession of by said sheriff, and the store-room and factory in which they were contained locked and shut up, so as to deprive the plaintiff of the control of said goods and property; that then the plaintiff is entitled to recover such damages as the jury, under the circumstances of the case, may think just to allow.

2. That in estimating such damages, should the jury find the facts stated in the foregoing prayer, they are to regard the actual value of the goods and property seized, and the loss to the plaintiff resulting from the breaking up of his business; and should they believe said seizure to have been made wantonly, and with notice of the claim of the plaintiff, that then they may find exemplary damages.

*Defendant's Prayers.*

1. That the proceedings in Baltimore county court, on the attachment issued by the present defendants against Samuel Comly (a transcript whereof is in evidence), are conclusive against the right of the plaintiff to recover in this action.

2. That it is competent for the jury to find from the evidence, that the alleged agreements between the said Samuel Comly and Thomas J. Folwell, and between the said Folwell and the plaintiff (if any such agreements were actually made) were made by the parties aforesaid with intent to delay, hinder and defraud the creditors of the said Samuel; and if such alleged agreements are found to have been made with intent as aforesaid, then the same are fraudulent and void as against the present defendants.

3. That the alleged agreement between the said Comly and Folwell (if any such agreement is found by the jury

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to have been made) is fraudulent and void as against the defendants, unless the jury shall also find that the said Folwell, pursuant to said agreement, did obtain the actual and exclusive possession of said goods. And if the jury shall find that, at the time of making the alleged agreement between the said Comly and Folwell (if any such agreement was actually made) the said goods were in the actual custody and possession of the plaintiff, holding them as agent of, and for the said Comly, and that after making the said agreement, and without entering into the actual and exclusive possession of the said goods, the said Folwell agreed to sell said goods to the plaintiff, in manner as stated in evidence by him, then that said agreements are fraudulent and void as against these defendants.

4. If the jury shall find from the evidence that the goods in question were the property of the plaintiff, at the time of the seizure thereof, under the writ of attachment of the present defendants, issued out of Baltimore county court as aforesaid, and that the defendants caused said goods to be seized as aforesaid, under an impression fairly entertained that they were the property of the said Samuel Comly, and in the fair pursuit of their supposed legal rights, the measure of damages to be assessed by the jury will be the value of the goods at the time of seizure, with interest from that date; and that the defendants will be entitled to a deduction for the sum retained by the sheriff, to be paid over to the landlord of the premises whereon said goods were found, at the time of seizure as aforesaid.

The court rejected the prayers of the plaintiff, and also those of the defendants, and instructed the jury as follows:

TANEY, C. J. 1. It being admitted that the goods in question were the property of Samuel Comly, of Philadelphia, from the 13th of March 1846, to the 20th of April in the same year, and that, during that time, the plaintiff, as agent of Samuel Comly, resided at the factory mentioned

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in testimony, and held possession of the said goods, and carried on the business of the factory for and in the name of the said Samuel Comly—the possession of the plaintiff, during that time, was the possession of Samuel Comly. And if the jury find that the sales by Samuel Comly to Folwell, and by Folwell to the plaintiff, were *bond fide* and upon the valuable consideration stated in the plaintiff's testimony, still the said goods were liable for the debts of Samuel Comly, unless the jury find that the plaintiff had, in some mode or other, made known to the public the change of possession, and manifested that he no longer held the property as the property of Samuel Comly, and for him, but in his own right. The sale and delivery to Folwell, and by him to the plaintiff, being private, and without witnesses to either, and producing no visible change in the possession or ownership, the said sales were fraudulent and void as against the creditors of Samuel Comly, until the change in the title and the character of the possession was made known as above stated.

2. If the jury find that the sales alleged to have been made by Samuel Comly to Folwell, and by him to the plaintiff, were collusive, and intended to hinder, delay or defraud the creditors of Samuel Comly, then the said sales were fraudulent and void as against the creditors of Samuel Comly, and the plaintiff is not entitled to recover.

3. If, under the above directions of the court, the jury find that the plaintiff is entitled to recover, the measure of damages is the value of the property at the time it was attached, with interest to this time, and such further damages, if any, as the jury may find was actually sustained by the plaintiff, by breaking up the business in which he was engaged, deducting from the amount the rent due on the premises at the time the attachment was laid.

Judgment of nonsuit.

*J. Glenn and S. H. Taggart*, for plaintiff.

*Th. S. Alexander and Wm. F. Frick*, for defendants.

HENRY ADDERLY

*vs.*AMERICAN MUTUAL INSURANCE COMPANY OF  
BALTIMORE.

In order to entitle the plaintiff to recover for a loss, on a policy of insurance on his vessel, she must, at the time the policy attached, have been seaworthy for such a voyage as she was engaged in at the time of the disaster, and have been lost by reason of one of the perils insured against in the policy.

She is presumed to have been seaworthy at that time, unless the contrary is proved by the testimony; and the burden of proof of unseaworthiness is on the defendant.

If there was a leak in the vessel, at the time of sailing on the voyage insured for, of such a nature, that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak, before proceeding on the voyage, and the disaster was occasioned by his omission to do so, and would not otherwise have happened, there can be no recovery for the loss.

But if the character of the leak were such, that a master of competent skill and judgment might reasonably have supposed that she was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account, omitted to examine and repair, then such omission to examine and repair will be no bar to the recovery.

Circuit Court, November Term, 1847.

This action was instituted on the 31st October 1846. The plaintiff was a British subject, residing at Nassau, the owner of the brig *Victoria*; and he brought this action against the American Mutual Insurance Company of Baltimore, upon a policy of insurance effected on said vessel, which was lost on the voyage insured for.

The defence taken was unseaworthiness at the time of the insurance; and negligence on the part of the master or owner, after the voyage had commenced.

The facts of the case do not appear, except in the fol-

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lowing prayers, on the part of the plaintiff and defendant, and the court's instructions to the jury.

*Plaintiff's Prayers.*

1. That the question of seaworthiness, or unseaworthiness, is a question for the jury; and that the presumption is that the brig was seaworthy, till the contrary is proved.

2. That the burden of proof of unseaworthiness is upon the defendant.

3. That in determining whether the vessel was seaworthy or not, the jury are to regard the whole evidence; and that part of the evidence bearing on said question, consists of the reports made to the said defendant and other underwriters in Baltimore, by their agent, Captain Clackner, and the fact of the receipt of the premium on the policy, after the defendant had been made acquainted with the particulars of the disaster which had happened to the brig, as the same were set forth in the papers delivered to them by the plaintiff's agent.

4. That although a leak may have been sprung on the second day after leaving Long Island, and continued for the time stated in the evidence; yet, that if on the third day, being the day of the brig's touching at Nassau, and some time before reaching there, the leak stopped, and the vessel did not spring a leak for between three and four days after leaving Nassau, and the leak was then caused by stress of heavy weather and high seas, then that there was no negligence on the part of the master or owner, in not causing said vessel to be carried into Nassau for examination and repairs.

*Defendant's Prayers.*

1. The defendant prays the court to instruct the jury that, before the plaintiff can recover in this case for the loss of the brig mentioned in the policy sued on, the jury must find that, at the commencement of the risk, the brig was tight, staunch, strong and well found for a voyage from

Long Island to New Orleans, by way of Nassau, with a cargo of salt; and that neither her construction, nor the materials of which she was built, were such as to render her unfit to encounter the ordinary sea-perils of such a voyage.

2. The defendant further prays the court to instruct the jury that, if they find from the evidence, that upon the first day after leaving Long Island, with her cargo of salt, the said brig began to leak, so that it was necessary to pump her every half-hour, and that she continued to leak until her arrival at Key West, where she was condemned as utterly unseaworthy, by the report of the surveyors, given in evidence, and that she commenced leaking in this manner in moderate weather, without any apparent cause, or extraordinary accident, to which the leaking could be ascribed, and that the leak continued for four or five days before the brig encountered any heavy weather or high seas at all, there is a strong presumption that the brig was unseaworthy when she sailed from Long Island; and in the absence of any proof, on the part of the plaintiff, of any sea-peril occurring to the brig, between the time the risk commenced and when she began to leak, sufficient to produce the leak, the plaintiff is not entitled to recover.

3. The defendant further asks the court to instruct the jury that, if they find the facts stated in the preceding prayer, and further find that the said brig, upon the second day after leaving Long Island, being in a condition to need repairs, and after she had been for a day leaking so badly that it was found necessary to pump her every half-hour, arrived off Nassau, her home port, where she could have been fully repaired, and where the master went ashore at 10 P. M. of one day, and returned at 10 A. M. on the following day, after having communicated with the owners and received his instructions to proceed upon the voyage to New Orleans—under all these circumstances there was negligence on the part of the master or owner, in not having the brig examined and repaired at Nassau, and the

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defendant is not liable for any subsequent loss or damages to said vessel, which was produced or increased by such negligence.

TANEY, C. J. 1. In order to entitle the plaintiff to recover, the vessel must have been seaworthy at the time the policy attached; that is to say, seaworthy for such a voyage as she was engaged in at the time of the disaster; and have been lost by reason of one of the perils insured against in the policy.

2. But she is presumed to have been seaworthy at that time, unless the jury find the contrary is proved by the testimony; and the burden of the proof of unseaworthiness is on the defendant.

3. If, when the vessel touched at Nassau, the leak, mentioned in the testimony, was such, that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak before proceeding on the voyage, and the jury find that the disaster was occasioned by his omission to do so, and would not otherwise have happened, then the plaintiff is not entitled to recover.

4. But if the jury find that, from the character of the leak, a master of competent skill and judgment might reasonably have supposed that she was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account omitted to examine and repair, then such omission to examine or repair the vessel at Nassau, is no bar to the recovery of the plaintiff.

Verdict for the plaintiff.

*R. Johnson and J. M. Campbell, for plaintiff.*

*Brown & Brune, for defendant.*

## GEORGIA INSURANCE AND TRUST CO.

*vs.*EVAN T. ELLICOTT, ANDREW ELLICOTT AND ELIAS  
ELLICOTT.

In order to remove the bar of the statute of limitations, it is necessary that there should either be an express promise to pay, or an admission of the debt, in such terms as imply that the party is liable and willing to pay.

Where a person applies for the benefit of the insolvent laws of Maryland, the list of debts due by him, required to be filed with his application, is not such admission of indebtedness, as, upon any just construction, can be held to imply that he is willing or intends to pay such indebtedness to its full extent.

On the contrary, the very object of the petition, and the list of debts or other papers accompanying it, is to be discharged from his debts without payment in full.

Circuit Court, November Term, 1849.

*Plaintiff's Prayers.*

1. The plaintiff prays the opinion of the court and their instruction to the jury, that the return of the debt sued on in this case, in the schedule of the defendants, when they made their respective applications for the benefit of the insolvent laws of Maryland, is evidence to the jury of an acknowledgment of the said debt by the defendants, sufficient to remove the bar of the statute of limitations, pleaded in this case, so far as to entitle the plaintiff to recover a judgment to affect the property of the defendants, which they may hereafter acquire by gift, descent or devise, or in their own right by due course of distribution.

2. The plaintiff prays the opinion of the court and their instruction to the jury, that the return of the debt sued on in this case, in the schedule of the defendants, when they made their respective applications for the benefit of the insolvent laws of Maryland, is evidence to the jury of an



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acknowledgment of the said debt by the defendants, sufficient to remove the bar of the statute of limitations, pleaded in this case.

*Opinion of the Court.*

TANEY, C. J. It appears from the evidence, that the claim of the plaintiff is barred by the act of limitations, unless the bar is removed by the subsequent admissions of the defendants. The admission relied on is contained in the papers filed by them upon their application to the commissioners for the benefit of the act passed by the general assembly of Maryland for the relief of insolvent debtors. This law requires the applicant to present with his petition a list of the debts then due by him. And in the list of debts due from them, presented by the defendants, the claim in question is stated to be one; and three years had not elapsed from the time the petition was presented before this suit was brought. In order to remove the bar of the statute, it is necessary that there should either be an express promise to pay, or an admission of the debt, made in such terms as would imply that the party was liable and willing to pay. This was the decision of the supreme court in the case of *Moore v. Bank of Columbia*, 6 Pet. 86; and this decision is perhaps entitled to the more weight, because it was made upon the construction of the statute of limitations of Maryland, which, by act of congress, was the law of that part of the district in which the suit had been brought.

There is no express promise in this case, nor can the admission, upon any just construction, be held to imply that the defendants are willing or intend to pay the debt to its full extent; on the contrary, the very object of the petition, and the list of debts or other papers that accompany it, is to be discharged from this and other debts without paying the full amount; and if we were to construe this admission to imply a promise on their part to pay the whole claim, and sufficient to authorize a verdict for the

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entire debt, we should expound it in direct contradiction to its obvious meaning. They make the admission in order to obtain a discharge without full payment, and to be released from so much of it as their property may be found insufficient to pay. The second instruction asked for cannot, therefore, be given.

The first is equally objectionable. Undoubtedly, any property which the defendants may have since acquired, or may hereafter acquire, by descent, devise or in the course of distribution, will be liable for this debt, as well as the other debts mentioned in their schedules; but there is no evidence that the defendants have acquired property of any kind, by either of these modes, since their petition; and consequently, there is no testimony in the case upon which this instruction could be founded.

The verdict of the jury must, therefore, be for the defendants.

Verdict for defendants.

*D. Stewart*, for plaintiff.

*John Glenn*, for defendants.

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FREDERICK W. BRUNE and SONS

*vs.*

WILLIAM H. MARRIOTT, Collector.

The eighth section of the tariff act of 30 July 1846, which declares that, under no circumstances, shall the duty be assessed upon less than the invoice value, did not repeal the previous law (2 March 1799) which authorized allowances for deficiencies and damages incurred during the voyage; it applies to the *value* merely, and not to the *quantity* of the article imported.

The effect of the sixteenth section of the tariff act of 1842 was, wherever an *ad valorem* duty was imposed, to charge it only upon the amount of merchandise actually imported.

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In the absence of any official appraisement of the amount and value of the deficiency, the only rule of abatement approximating to exact justice between the parties, would seem to be this—to estimate the dutiable value of the articles (sugar and molasses) lost by leakage, in the same manner and upon the same principles that the dutiable value of the amount mentioned in the invoice is ascertained, and to reduce the assessment accordingly, the *amount* of the deficiency being ascertained from the returns of the official weigher and gauger.

A *pro rata* abatement is to be made also upon the amount of the incidental charges at the port of shipment, such as commissions, &c., and upon the value of the bogsheads in which the *sugar* and molasses are shipped (all of which enter into the amount upon which the duties are assessed).

A protest in the following terms—"Having been informed that it is the intention of the secretary of the treasury not to make allowance on the payment of duties, on such articles as may result here less in quantity, from loss in weight or leakage, than at the time of shipment (for instance, sugar, molasses, &c.), and on which a duty *ad valorem* of the invoice is exacted, we hereby protest against the payment of such entire amount of duty, being of opinion that the law at present in force authorizes an allowance for actual loss in weight or gauge, as shown by the difference in the invoice and the returns of the weighers or gaugers of such cargoes, after delivery in this port." "We desire that this protest should extend to all our importations of sugar and molasses, since the operation of the present tariff, viz.," &c.: was *held*, under the act of 1845, not to apply to duties previously paid, but to apply to all duties exacted after the protest, and that a particular protest in each case was not required by the law.

The protest is not required to be made before the payment of what are called the *estimated duties*; for this payment is necessarily regulated by the invoice *quantity*, as well as the invoice *price*.

The protest is legally made when the duties are finally determined and the amount assessed by the collector, and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the treasury department, that he will be held personally responsible, if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

The payment of money upon *estimated duties* is rather in the nature of a pledge or deposit than a payment; for it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, the surplus belongs to the importer, and is returned to him.

Circuit Court, April Term, 1849.

The facts of this case, which was instituted by consent, on the 4th of November 1848, are set forth in the following statement:

*Statement of Facts.*

It is admitted, that the schedule A, herewith filed, to be taken as part of this statement, in its first, second and third columns correctly exhibits the importations of sugar and molasses by the plaintiffs, into the port of Baltimore, between the 8th day of February and the 8th day of November, A. D. 1847, both inclusive, and likewise the names of the vessels by which, and the places from which such importations were made, and the dates of the entries of said importations; that column four exhibits the kind of goods so imported, and how they were contained; that column five exhibits the quantity, in pounds, of sugar, and in gallons, of the molasses, shipped in the West Indies, as stated in the invoices which accompanied such importations; that column seven exhibits the dutiable value in foreign currency (including all costs and charges) of the goods mentioned in the said invoices, which in column eight is changed into American currency; and upon this value duties were computed, and exacted by the defendant, of the plaintiffs, and paid by them, in order to get possession of their said goods, and that the amount of duties so exacted and paid is stated in column nine.

It is further admitted, that all the goods imported by the plaintiffs as aforesaid, after their arrival and entry at the custom-house, were, by the direction of the defendant, submitted to the examination of weighers and gaugers, officers belonging to the custom-house, who made returns of the weights and gauges, respectively, of the goods submitted to them, which returns are correctly exhibited in column six.

It is further admitted that, if column eight correctly exhibits the value at the place of shipment, of the quantity of goods mentioned in the invoices, including costs and charges, and exhibited in column five as having been shipped, then column ten exhibits the proportionate value, at the place of shipment, of the diminished quantity of goods, as ascertained by said officers to have arrived in Baltimore, and exhibited in column six, including their

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proportionate share of costs and charges. That column eleven exhibits the amount of duty, at thirty per cent. ad valorem, on the goods as valued in column ten; that column twelve exhibits the excess of duties, alleged by the plaintiffs to have been over-paid by them, and the aggregate of the sums in this column constitutes the claim, without interest, which they seek to recover in this action.

The plaintiffs also claim interest on the alleged over-payments appearing in column twelve, from the time of such payments, respectively, and which interest is to be hereafter correctly ascertained.

It is agreed, that column ten of schedule B exhibits the value, in American currency, of the deficiency of the goods upon arrival, as compared with the invoices, agreeably to the ascertainment of the actual quantity of goods arrived, by the gauger and weigher, respectively, no account being taken of costs and charges, except in the case of molasses, the proportion of *commission* being allowed on that article.

It is also agreed, that column eleven, in said schedule, exhibits the amount of thirty per cent. on the value of such deficiency so exhibited.

It is further admitted, that the above-mentioned deficiency between the quantity of goods which arrived, according to the returns of the government officers, and that appearing in the invoices, occurred on and was produced by the voyage of importation; and it is also admitted, that allowances for damage to sugar and molasses injured by a peril of the sea, on the voyage of importation, are calculated in the mode contended for by the plaintiffs, as the true mode of ascertaining their alleged over-payments.

It is further admitted, that upon the 9th April 1847, the plaintiffs addressed and delivered to the defendant the general notice or protest, in writing, signed by them, and herewith filed, marked C;<sup>1</sup> and likewise, at the time of the entries of the cargoes of the Uzardo, Samuel D. Mitchell, Isabella, G. W. Russell, W. J. Watson, and Arietes, re-

<sup>1</sup> See 9 Howard 622.

spectively, addressed and delivered to the defendant a special notice or protest, in writing, signed by them, and copies of which protests are herewith filed, marked D.

It is further submitted, whether the protest of the 9th April 1847, can be applied to the cases of duties claimed to have been paid unjustly upon the cargoes of any vessel on whose cargoes the deficiencies were ascertained and finally adjusted, before the date of said protest, and whether it can be applied to the cargoes of those vessels whose deficiencies were not finally adjusted by the impost clerk, and whose duties were not finally charged to the collector in his accounts, until after said protest, although said deficiencies were ascertained, in fact, by the gauger and weigher, respectively; and whether such general protest can be applied to any subsequent importations and payments of the plaintiffs, in regard to which there was no special protest.

And it is admitted, that the deficiencies upon all the cargoes arriving before the Sarah Adams, had been ascertained by the gauger and weigher, respectively, and returned by them to the defendant, and had been finally adjusted by the impost clerk, and the duties on such cargoes had been charged to the defendant, in his accounts with the treasury, before the 9th of April 1847; but it is admitted, that although the gauger and weigher had returned to the defendant the deficiencies on the cargoes of the Sarah Adams, Sebois, and Magnolia, yet, that the impost clerk, whose duty it is to compare such returns with the invoices, did not act thereon, and ascertain and adjust the true amount of duties due on such cargoes, and report thereon to the defendant, until after the said 9th of April.

And it is further admitted, that the gauger and weigher did not make their returns of the deficiency in the cargo of the Frances Partridge, until the 10th of April 1847.

It is also admitted, that the custom of the importing merchants of Baltimore, in the sale of sugar and molasses, is as follows, viz: sugar is sold per pound, *i. e.* at a given

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price per hundred pounds; and molasses, per gallon, upon the quantity returned by the weigher and gauger, as having been imported, without any reference, in either case (as to the price), whether a deficiency in quantity has been suffered on the voyage of importation or not, and also that in no case is the cask in which the sugar or molasses is contained, sold separately by said importing merchants.

And it is also admitted, that in all importations of sugar from Porto Rico, no charge for casks appears in the invoices, but that in importations of molasses from that island, and of sugar and molasses from Cuba, a separate charge is made for the casks.

It is agreed that any acts of congress, and the instructions of the secretary of the treasury, and his correspondence with the plaintiffs, may be read or referred to by either party, for whatever purpose they may be legally available. Upon the foregoing statement of facts, the questions to be submitted to the court, are—

1. Whether the amount of duties, or any part thereof, exacted by the defendant and paid by the plaintiffs, were illegally exacted, by reason of being charged upon the entire amount and value of the goods, appearing in the invoices to have been shipped, without any allowance for the deficiency in weight or gauge from the voyage of importation, as shown by the returns of the government officers; and—

2. Whether the plaintiff can recover back in this suit, the duties so exacted, or any part thereof.

If, upon these questions, the opinion of the court should be in favor of the plaintiffs, then the court shall give judgment for the plaintiffs, with costs; but if, on these questions, the opinion of the court should be in favor of the defendant, then judgment shall be entered for the defendant, with costs.

And it is further agreed, that if the judgment in this case should be in favor of the plaintiffs, the amount, including interest, for which the judgment shall be entered

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up, may be hereafter calculated, in conformity with the principles which the court shall decide to govern the case; with liberty to either party to appeal from the judgment of the court, and with the further agreement, as part of this statement, that the court shall be at liberty to draw such inferences from the facts above-stated, as a jury might or would draw therefrom; and that either party shall hereafter have power to add to this statement any facts admitted by the other party to exist, which may be deemed essential by the court for the proper decision of the above questions.

*Brown & Brune*, for plaintiffs.

*William L. Marshall*, for defendant.

The opinion of the court was delivered by

TANEY, C. J. This suit is brought against the collector, to recover certain duties paid under protest. It is submitted upon a case stated, in which it appears that, upon sundry importations of sugar and molasses, there was a considerable loss by leakage, during the voyage, and the quantity actually imported and received, as ascertained and certified by the proper officers, much less, in several cargoes, than that stated in the invoices. The duties were, however, assessed upon the invoice amount; and this suit is brought to recover back so much of the money as was paid for duties, upon that portion of the cargoes which was lost, on the voyage, by leakage.

The question arises upon the proviso in the eighth section of the act of 1846, which declares, that under no circumstances shall the duty be assessed upon less than the invoice value, any law of congress to the contrary notwithstanding. The question is, whether this proviso includes the quantity as well as the price or value of the merchandise mentioned in the invoice. The clause is cer-



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tainly not free from ambiguity; the secretary of the treasury, in his circular letter of instructions to the collectors, dated 25th November 1846, took notice of this difficulty, and expressed his opinion that it did not repeal the previous law, which authorizes allowances for deficiencies and for damages occurring during the voyage; the same opinion is more particularly stated in his letter of 30 January 1847, to the collector of the port of New Orleans; and the instructions given in this letter would apply directly to cases like the one now before us, and sanctions the claim made by the plaintiffs. This instruction was, however, soon after recalled, and it seems, was not afterwards acted upon, nor are we able to discover, from the correspondence before us, the construction finally placed upon this proviso, by the department, nor to ascertain precisely the classes of cases to which it was supposed to extend, or to which it was supposed not to apply.

We think the instruction first given, as above mentioned, is the true one, and that it was not the intention of the act of 1846 to annul the previous laws upon that subject. The principles of justice would seem to require that the merchant should be charged with duty only upon the merchandise which he actually introduces into the country; he imports nothing more, and brings in nothing more for sale or for consumption. He could not protect himself, by insurance, from ordinary leakage and damage, in articles which, from their nature, are liable to such casualties, without paying a premium heavier perhaps than the amount of loss, nor is it, we believe, one of the hazards usually, if ever, undertaken by the underwriters. If the duty is charged upon what is lost as well as what arrives, he will in fact pay, in almost every case, a higher duty on his importation than the law intends to impose; and the proviso would be inconsistent with the other provisions, and with the spirit of the tariff of 1846, if it be construed to exact such duties; for this law is avowedly framed on the most liberal principles of commerce, and contemplates a reduc-

tion of duties upon articles of this description to a lower standard. It would hardly comport with this policy, to place in the law a proviso which, upon articles so important in commerce as sugar and molasses, would, in many cases, make the duties higher than they had ever been before, and indeed, in almost every cargo, make them higher than the rate specified in the law. We think the proviso refers to the price stated in the invoice, and not the quantity, and did not repeal the former law authorizing deductions and allowances to the importer in the cases mentioned.

There is another difficulty, however, in this case, since none of the previous laws make any specific provision for loss of quantity in sugar or molasses, by leakage, on the voyage; nor does it appear that the treasury department have formed any definite opinion on this particular question, or established any settled or uniform rule on the subject; for we find, upon examining the correspondence and instructions of the department, as we have already stated, that different instructions were given at different times, and finally an order given to make the allowance on molasses, but not on sugar. We do not see how, from the terms of this law, or of any previous act of congress, this distinction can be made; for the clause in relation to liquors, in the law of 1799, ch. 22, sect. 59 (1 Stat. 672), can hardly be construed to embrace molasses. It is, however, evident, we think, that under the act of 1842, wherever the duty was *ad valorem*, it was charged only upon the merchandise actually imported or brought in; for the sixteenth section, which regulates the manner of estimating and charging the *ad valorem* duties, directs the appraisers, by all the ways and means in their power, to ascertain the value in the foreign market, and to charge the duty upon that value. They were not confined in any case to the invoice; and consequently, if the goods actually imported were found to be of less value than the price stated in the invoice, the duties were chargeable only on the value ascertained by the appraisers. Whether this diminution in value was occa-

sioned by damage to the quality, on the voyage, or loss in quantity, could make no difference; for the appraisers appraised only the goods received and imported into the country, and it was the value of these goods which they were required to appraise, and upon which the duty was to be paid, and not merchandise which was stated in the invoice, but had not been actually brought in.

This construction of the sixteenth section of the act of 1842 is confirmed by the twenty-first section of the same law, which expressly provides that when any deficiency in the quantity mentioned in the invoice is found in any package, the importer is to be allowed for it in estimating the duties. It is true, that the language in which this provision is made, would seem to make it applicable only to dry goods; but it can hardly be supposed that any distinction was intended to be drawn between dry goods and groceries, or that a rule deemed just as to one, would have been denied to the other; on the contrary, it shows that congress intended to impose the duty only upon the merchandise imported, and that the construction we have given to the sixteenth section, is the one which congress intended it should receive.

As this appears to have been the policy of the government, uniformly manifested before the tariff act of 1846, we do not think that the provisions in relation to the invoice value could have been intended to change it; a different construction would make the law not only unjust in its principles, but would, in a multitude of cases, be likely to enhance the duties on sugar and molasses above the tariff of 1842, instead of reducing them. The language of the proviso does not require such a construction; and it would be opposed to the general legislation of congress, and more especially to the general scope and policy of the act of congress in which it is found.

The next question is, how is this deficiency to be ascertained and estimated? Regularly this should, it would seem, be done by the appraisers; for some of the items

which make up the dutiable value of the goods, would be the same upon the quantity of sugar or molasses received, as upon the quantity invoiced; but others certainly, and the more important ones, would not. We understand that, since the act of 1846, no appraisement is made unless there is an excess over the quantity invoiced, or the goods are undervalued in the invoice; but the individual, of course, cannot be deprived of a legal right, if he produces the best evidence which the nature of his case will permit; and in this case the returns of the weigher and gauger show precisely the deficiency in quantity, and the invoice shows the amount upon which the duty was assessed; and the deficiency is admitted to have arisen from leakage on the voyage.

In the absence of any official appraisement, the only rule of abatement approximating to exact justice between the parties, would seem to be this—to estimate the dutiable value of the sugar and molasses lost by leakage, in the same manner, and upon the same principles, that the dutiable value of the amount mentioned in the invoice is ascertained, and to reduce the assessment accordingly. It appears, indeed, that in the importation of sugar from Cuba, the price of the hogshead is charged separately in the invoice, and it has been argued that, as these hogsheads are actually imported, there ought to be no deduction of that item, nor upon the charges at the foreign port, which also, under the act of congress, constitute a part of the value upon which the duty is assessed. But this would hardly be just to the merchant; for the hogsheads are of much more value in Cuba than in this country, and they enhance the price of the hogshead of sugar in the foreign market. And as a smaller number would be required to contain the diminished amount of the sugar received, it is just that an abatement should be made for them in the same ratio with the sugar; for otherwise, the cargo of sugar, from the unnecessary number of hogsheads, would be assessed at a higher value than it was really worth in the foreign market; that is to say, higher

than the quantity actually received was worth in the port at Cuba. And the same may be said of most of the charges of any importance; certainly, so far as concerns the commissions, which would necessarily be reduced in proportion with the market value of the merchandise shipped.

Besides, in the invoices of sugar from Porto Rico, there is no separate charge for the hogsheads; the invoice states that so many hogsheads of sugar were shipped, at such a price. Undoubtedly, the manner in which it is put up, and the price of the hogsheads which contain it, form a part of its value in the foreign port, and constitute, therefore, a part of the sum in the invoice, upon which the duty is charged; yet, if one or more hogsheads are lost by leakage, and the importer is entitled to an allowance for it, the only mode by which the abatement could be made, would be, by the price of the hogshead of sugar as charged in the invoice. The papers which accompany the cargo, do not show what was the price of the hogshead, and if there is no appraisement, the collector has no mode of ascertaining the reduction except by the price of the sugar. To make an allowance for sugar imported from Porto Rico by this rule, and to refuse the abatement for the hogsheads, on importations from Cuba, would be to establish a different tariff for these two islands, and would, in effect, make it higher on the sugars of the latter than those of the former.

Independently, however, of this consideration, we think, for the reasons above stated, that where there is no appraisement, the reduction should be made on the whole dutiable value of the article; for no duty ought to be exacted beyond what the law has imposed; and if it is not practicable to ascertain the precise amount of the loss, the merchant ought not, on that account, to be made liable to a charge, which evidently was not intended to be imposed upon him. The same reasoning applies to the allowances upon the importations of molasses, both from Cuba and Porto Rico, in which the hogsheads are always separately charged. The reduction, in the opinion of the court,

ought to be made in proportion to the dutiable value of the part lost.

The remaining question is, what duties were paid, under protest, within the meaning of the act of 1845? That act requires that the protest shall be in writing, signed by the claimant, at or before the payment of the duties, and set forth, distinctly and specifically, the ground of objection. The protest of 9 April 1847, cannot apply to payments previously made, and the plaintiff is not entitled to recover them; but it is sufficient to cover all subsequent payments, and a particular protest in each case is not required by the law. The object of the protest is merely to give notice to the officer of the government, that the importer means to claim the reduction, and to make known to the collector the grounds upon which he makes the claim. In these respects this protest is sufficiently explicit, and covers all the cargoes upon which the duties had not been finally assessed and adjusted by the collector.

The protest is not required to be made on or before the payment of what are called the estimated duties; for this payment is necessarily regulated by the invoice quantity, as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice. The protest is legally made, when the duties are finally determined, and the amount assessed by the collector; and a protest before, or at that time, is sufficient notice, as it warns the collector, before he renders his account to the treasury department, that he will be held personally responsible, if the portion disputed is not legally due; and that the claimant means to assert his rights in a court of justice. The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment; for it remains in the hands of the proper officer, subject to the final assessment of the duties, and if more has been paid than is due (which

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is most commonly the case), the surplus belongs to the importer, and is returned to him.

Upon the whole, the court is of opinion, that the plaintiff is entitled to recover for the amount of the deficiency in the sugar and molasses, by leakage, as mentioned in the case stated; that the reduction ought to be made according to the dutiable value of the portion lost; and that the protest of 9 April 1847, covers all the cargoes where duties had not before been finally assessed and adjusted by the collector.

If the parties can, by agreement, ascertain the amount due to the plaintiffs, stating the account upon these principles, with interest from the times of payment, the court will give judgment in their favor for that sum. But if they cannot agree, the court will refer the papers to a commissioner, with directions to state the account upon the principles hereinbefore set forth.

Judgment for plaintiffs, on the case stated.

Affirmed by the supreme court, at December Term, 1849,  
9 Howard 619.

*Brown and Brune*, for plaintiffs.

*William L. Marshall*, District Attorney, for defendant.

## RICHARD TUCKER and HENRY TUCKER

*vs.*

GEORGE P. KANE, Collector.

An appraisement made under the act of congress of 30th August 1842, by merchant appraisers, appointed by the collector of customs, to appraise and value imported goods, in a case of dissatisfaction on the part of the importer with the official appraisement, is final, and must be deemed and taken to be the true value of the goods, and the duties must be levied upon them accordingly.

The appraisers are referees appointed to decide between the officers of the government and the importers.

The law does not require that the appraisement of the merchant appraisers should have all the formalities and precision of a common law award, nor is it necessary to set forth in it the principles upon which they acted, nor the evidence by which they were governed.

If it could even be proved that there was evidence before them sufficient to show that their decision was against the weight of evidence, yet their judgment could not on that account be reversed; there is no tribunal authorized to review it; the law makes it final as to the question of value.

If, indeed, it appeared on the face of the appraisement, that they merely intended to ascertain the price paid for the article, and not its market value in the principal markets in the country, the appraisement would be a nullity.

The construction of their award cannot be influenced by the knowledge of the secretary of the treasury, that there was evidence before them, which ought, in his judgment, to have produced a higher valuation.

The appraisement must speak for itself, and be construed by its own language; if its validity is to be impeached by anything outside of the award, it must be by testimony showing that the question referred was not decided, or some misconduct in the appraisers.

The twenty-third and twenty-fourth sections of the act of 30th August 1842, do not confer upon the secretary of treasury, the power to set aside the appraisement, because, from the terms used by the appraisers, and his knowledge of the evidence before them, he was of opinion, that they intended to estimate the value of the importation at its cost to the importers, and not at the general market value.

The appraisement, if a nullity at all, is so, independently of his decision, and he has no power to review it.

The twenty-third section of the act of congress authorizes the secretary to establish rules and regulations to secure a just and impartial appraisal,



## Tucker v. Kane.

and all appraisers, official or merchant, are bound by the rules and regulations. But they are merely modes of proceeding by which the appraisers are to obtain evidence and ascertain the value; the valuation they make, under these rules and regulations, must be their own impartial judgment, and the secretary cannot set it aside, because he is of opinion that it is against the weight of evidence.

The twenty-fourth section of the act does not apply to an appraisement regularly made by merchant appraisers.

During the pendency of an appeal under this act, made by the importer, it is the duty of the collector to proceed, until he has obtained a valid appraisement by merchant appraisers; and until this is done, he has no right (after the appeal is made), to exact duties on the enhanced valuation of the *official* appraisers, nor the penal duty which may follow this valuation.

The importer is not bound to make a second appeal, nor is the collector authorized to charge and collect the duties, as if the decision of the *official* appraisers were final and conclusive, while the appeal from their decision is still pending and undecided.

Circuit Court, November Term, 1850.

TANEY, C. J. This action is brought by the plaintiffs against the defendant, as collector of the port of Baltimore, to recover back certain duties paid by them under protest, upon a quantity of pimento imported, in the schooner Juliet, from St. Ann's Bay, in the Island of Jamaica.

The official appraisers determined that the true value of this pimento, in the principal markets of the country from which it was imported, exceeded the invoice price; and this excess being, according to the appraisement, more than ten per cent., the penal duty of twenty-five per cent. was added, and the whole amount demanded by the collector. The importer was dissatisfied with this appraisement, and gave notice of his dissatisfaction to the collector, according to the provisions of the seventeenth section of the act of 1842; and the collector then appointed E. P. Cohen and Wm. Lemmon, two merchants of the city of Baltimore, and both citizens of the United States, to appraise and value the said goods. These appraisers undertook the duty assigned to them, and made their award in the following words:

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Baltimore, 16 November 1849.

The undersigned merchants, appraisers appointed to review the appraisement of the cargo of the schooner Juliet, from St. Ann's Bay, Jamaica, beg leave to report, that they have carefully investigated all the facts connected with this shipment, and feel satisfied, from the positive, as well as corroborative testimony submitted to them, that the price named in the invoice of pimento (viz., 2½ per pound), was the actual price paid for the same, and the true value of the article, at the time of shipment, and that the duties here should be adjusted accordingly.

We are very respectfully your obedient servants,

E. P. COHEN,

Wm. P. LEMMON.

To Col. GEO. P. KANE, Collector, Port of Baltimore.

This appraisement, it appears, was reported to the secretary of the treasury, by the collector, and the reply of the secretary states that, from the language of the appraisement, and from the circumstance, "that the merchant appraisers had before them evidence, furnished on appraisements at New York, of importations of pimento from Jamaica, shipped about the same time, going to show that the market value of the article was higher than that stated in the invoice under review, the department was compelled to infer that their estimate of value referred solely to the price or cost, paid by the owner or shipper, and not to the actual market value or wholesale price, at the time of shipment, in the principal markets of the country." And he proceeds to state that, upon these grounds, this appraisement was not in conformity with law, and must be disregarded; and that, if the importers were still dissatisfied with the appraisement of the United States appraisers, the collector, upon being notified by them, in writing, might select another set of merchant appraisers, to appraise these goods, and lay before them all the evidence in his possession, bearing upon the case.

## Tucker v. Kane.

The importers, however, refused to apply for another appraisement by merchant appraisers, insisting that the one already made was conclusive upon the subject; and thereupon, the whole amount of duties, as ascertained by the officers and appraisers, was, under the order of the secretary, demanded by the collector, and paid by the importers; and this suit is brought to recover back the excess thus paid, over and above the amount due on the appraisement of the merchant appraisers.

The act of congress declares that the appraisement of the merchant appraisers shall be final, and deemed and taken to be the true value of the goods, and the duties are to be levied upon them accordingly.

They are referees, appointed to decide between the officers of the government and the importers, when a difference shall exist between them, as to the value of the goods, upon which the duties are to be charged. The subject-matter in dispute, in this case, referred to the merchant appraisers, was the market value, or wholesale price of the pimento, at the time of the shipment, in the principal markets of the country, from which it was imported. They report that they have carefully investigated all the facts connected with this shipment, and feel satisfied from the positive, as well as corroborative testimony submitted to them, that the price named in the invoice was the actual price paid for the same, and the true value of the article. When they speak of the true value, they must, of course, be understood to speak of the value referred to them, that is, the market value or wholesale price, at the time of shipment, in the principal markets of the country from which it was shipped; this is the natural import of the words used, when taken in connection with the subject referred.

The law does not require that the appraisement of the merchant appraisers should have all the formalities and precision of a common law award; nor is it necessary to set forth in it the principles upon which they acted, nor the evidence by which they were governed. It is not suggested, that

there was any misconduct on the part of the appraisers; they were selected by the collector himself, and admitted on all hands to be highly respectable and intelligent merchants. And if it could even be proved, as mentioned in the letter of the secretary, above quoted, that there was evidence before them sufficient to show that the invoice value was too low, and their decision against the weight of evidence; yet their judgment could not, on that account, be reversed; there is no tribunal authorized to review it; the law makes it final, as to the question of value.

Certainly, if it appeared on the face of the appraisement, that they merely intended to ascertain the price paid for the pimento, and not its market value in the principal markets in the country, the appraisement would be a nullity, and would not fix the dutiable value of the goods. But, as we have already said, the language used by the merchant appraisers will not justify that construction; the fair construction of the instrument is, that the true value of which they speak, is the dutiable value they were required to ascertain, and concerning which they heard evidence, as appears by the correspondence produced by the government. And the construction of their written award cannot be influenced by the knowledge of the secretary, that there was evidence before them, which ought, in his judgment, to have produced a higher valuation. The appraisement must speak for itself, and be construed by its own language; and if its validity is to be impeached by anything outside of the award, it must be by testimony showing that the question referred was not decided, or showing some misconduct in the appraisers.

The power exercised by the secretary of the treasury, and contended for in the argument here, is supposed to be conferred upon him by the twenty-third and twenty-fourth sections of the act of 30 August 1842. It has been argued that, inasmuch as it is made his duty, under these sections, to secure a just, faithful and impartial appraisement of all goods, wares and merchandise, imported into

the United States, and just and proper entries of the actual market value and wholesale price thereof, he had the power to set aside this appraisement, because, from the terms used, and his knowledge of the evidence before them, he was of opinion that they intended to estimate the value of the importation at its cost to the importers, and not at the general market value. Undoubtedly, if it had appeared that the merchant appraisers had not decided the question submitted to them, their appraisement would have been a nullity, without any action upon it by the secretary of the treasury; and it would have been the duty of the collector, without any instruction or authority from the department, to call upon the appraisers for their award upon the matter actually referred; or perhaps, he might, in such a case, have appointed new merchant appraisers. But the decision of the secretary could not invalidate it; he has no power, we think, under the twenty-third and twenty-fourth sections, to review their judgment, nor to exercise any control over their decisions.

Indeed, even as relates to the government appraisers, the appraisement must be the impartial and independent judgment of their own minds. The twenty-third section, it is true, authorizes the secretary to establish rules and regulations, to secure a just and impartial appraisal; and all appraisers, official or merchant, are bound by these rules and regulations; but they are merely modes of proceeding, by which the appraisers are to obtain evidence, and ascertain the value; the valuation they make, under these rules and regulations, must be their own impartial judgment, and the secretary cannot set it aside, because he is of opinion that it is against the weight of evidence. The twenty-fourth section, in terms, is confined to the officers of the revenue, and cannot be construed to give him the power to set aside an appraisement, regularly made by merchant appraisers, nor does it make his construction of the law, as has been intimated in the argument, binding upon the court.

But if this award was open to the objections taken to it,

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still these duties were, we think, unlawfully exacted. The act of congress gives the importer the right to appeal from the decision of the official appraisers; that appeal has been made by the importer, and has not been withdrawn. It was the duty of the collector to proceed, until he had obtained a valid appraisement from merchant appraisers; until this was done, he had no right, after the appeal was made, to exact duties on the enhanced valuation of the official appraisers, nor the penal duty which followed this valuation. The importer was not bound to make a second appeal, nor was the collector authorized to charge and collect the duties, as if the decision of the official appraisers was final and conclusive, while the appeal from their decision was still pending and undecided.

But, as we have already said, we consider the appraisement of the merchant appraisers a valid one, and binding upon both parties; and the plaintiffs are, therefore, entitled to recover the amount collected, over and above the sum due on that appraisement.

*J. Glenn*, for plaintiffs.

*Z. C. Lee*, District Attorney, for defendant.

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UNITED STATES

*vs.*

JOSEPH WHITE, JOHN MCCOLGAN and WM. P. WHYTE.

Under the acts of congress of 3d March 1839 and 26th August 1842, an officer with a fixed salary is not entitled to any additional compensation for extra services, unless it is provided for by law, or by the regulation of an officer of the government, authorized by law to make it.

The regulation authorized by these acts, is a general one, fixing prospectively, the additional compensation for specific services, within the limits prescribed by law, and graduating it in different places, as he may, in his discretion, deem just and most advisable for the public interest.

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He is not authorized to give or refuse compensation, at his discretion or pleasure, in each particular instance, after the service is performed.

A navy-agent, therefore, is not entitled to compensation beyond his salary, as fixed by law, for any extra services, although such services may be out of the district for which he is appointed, and may, more properly, appertain to the duties of another navy-agent, or even to an officer of the government filling an office of a different character: his salary is the only compensation for services required of him, and performed by him, if he hold no other office or appointment.

He is not entitled to an allowance for the hire of a porter, unless such allowance be made by a general regulation of the secretary.

Nor is he entitled to an allowance for services rendered as pension-agent.

Where the secretary of the navy appointed the navy-agent at Baltimore, acting purser for the naval school at Annapolis: *held*, that he had the right to make such appointment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed; and that the court was bound to presume, in this instance, that the power was exercised under circumstances that justified the appointment, and that such navy-agent would be entitled to the salary allowed by law to pursers.

The circumstance that he held the office of navy-agent, at the same time, can make no difference; there is no law which prohibits a person from holding two offices at the same time. In the absence of any legal provision to the contrary, this appointment was valid; although, as a matter of policy, it would be highly exceptionable, in most cases, as a permanent arrangement.

The navy-agent is entitled to office rent and clerk hire, and to engage them by the quarter; if he is dismissed from office, before the end of the quarter, he will be allowed for the whole quarter.

## Circuit Court, April Term, 1851.

This was an action of debt instituted in the circuit court, on the 25th of March 1850, on the bond of the defendants, given to the United States, on the 14th of February 1846, to secure the performance, by Joseph White, of the duties of navy-agent, at the city of Baltimore.

The defendant claimed, by way of set-off against the claim of the plaintiff, amounting to \$6407 50, the following sums:

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This sum paid Midshipman Reany, by order of Chief of Bureau of Surgery, &c.; voucher on file in fourth auditor's office . . . . .	\$30 00
This sum as purser at naval school, per the appointment of Hon. George Bancroft . . . . .	5328 08
This sum as navy pension-agent . . . . .	1013 75
This sum charged for bills not belonging to station . . . . .	1149 84
This sum for porter hire . . . . .	742 50
This sum claimed for balance of office rent and clerk hire . . . . .	69 83
	<hr/>
	\$8334 00

Making a balance in his favor of \$1926 50.

At the trial, the plaintiff prayed the court to instruct the jury:

1. That the defendant, Joseph White, whose emoluments and pay were fixed by law as navy-agent, is not entitled, in this case, to any extra compensation, nor any other allowance, for the disbursement of the public money.

2. That the secretary of the navy had no power, under the laws or regulations of the navy, to appoint the defendant "acting purser;" no such office being authorized by congress.

3. That congress has prohibited any person from acting as purser, who shall not have been first nominated and appointed, by and with the advice and consent of the senate, and given bond; the defendant is, therefore, not entitled to the pay claimed by him as "acting purser," in this case, as he was not appointed by and with the advice and consent of the senate, and never gave a bond, as required by law.

Which instructions the court refused to give, and the following opinion was delivered by—

TANEY, C. J. This case must be governed by the acts of congress of 1839 and 1842; the decisions of the su-



preme court in relation to cases of this description, made previous to the passage of those laws, do not, therefore, apply.

Under these acts of congress, an officer with a fixed salary is not entitled to any additional compensation for extra services, unless it is provided for by law, or by the regulation of an officer of the government, authorized by law to make it. The regulation authorized by these acts, we understand to be, a general regulation, fixing prospectively the additional compensation for specified services, within the limits prescribed by law, and graduating it, in different places, as he may, in his discretion, deem just and most advisable for the public interest; he is not authorized to give or refuse compensation, at his discretion or pleasure, in each particular instance, after the service is performed; for that would open the door to favoritism and partiality, which it was the object of these laws to prevent. A navy-agent, therefore, is not entitled to compensation, beyond his salary, as fixed by law, for any extra services, although such services may be out of the district for which he is appointed, and may more properly appertain to the duties of another navy-agent, or even to an officer of the government filling an office of a different character; his salary is the only compensation for services required of him, and performed by him, if he hold no other office or appointment. The credits and set-offs claimed by the defendant must be tried and determined upon these principles.

1. He is not entitled to extra compensation for disbursing money, under the orders of the navy department, to pay for articles delivered or purchased out of his district; and it makes no difference in this respect whether they be purchased by himself or any other person, under the orders of the department; the item of \$1149 84 must, therefore, be disallowed.

2. Neither is he entitled to the credit of \$742 50 for the hire of a porter, while he held the office. The services of

such a person in the office of a navy-agent would, indeed, seem to be necessary, and the secretary, we think, had the power, by a general regulation upon the subject, to have made a reasonable allowance to provide one; but as he has not done so, the credit claimed cannot be allowed.

3. Nor can he set off the sum of \$810 99 for services as pension-agent. Undoubtedly, an appointment as pension-agent is a distinct one from that of navy-agent; and if by law or regulation, any compensation was allowed to a pension-agent, the defendant would be entitled to it. But the act of 20th April 1836, in express terms, forbids any compensation to be made for the payment of pensions, without authority of law. It is true that, at that time, the public money was deposited in banks, and the pensions paid by them; but this provision shows that it was the intention of congress that this duty should always be super-added to the duties of some other appointment or officer. The act of 22d February 1840, authorizes pension-agents to take certain fees from the parties interested, for administering oaths, but gives them nothing more. The first act which authorizes compensation by the public, is the act of 20th February 1847; and by this act, the secretary of war was authorized to allow a sum not exceeding two per cent. for the payment of pensions; the whole allowance to any one agent not to exceed one thousand dollars in any one year: it does not, however, appear that the secretary of war, or secretary of the interior, who has succeeded to the power of the secretary of war in this respect, has exercised the discretionary power conferred by this law, or made any regulation upon the subject. This item also must, therefore, be disallowed.

4. But he is entitled to set off the sum of \$5328 08 for his salary as acting purser to the naval establishment at Annapolis. The secretary of the navy had a right to appoint a purser *ad interim*, usually called acting purser, to discharge the duties of purser at this establishment, if the demands of the public service elsewhere, or any other suffi-

cient cause, put it out of his power to employ a purser regularly appointed. The court is bound to presume that the power, in this instance, was exercised under circumstances that justified the appointment of the defendant as acting purser. He performed all the duties of purser at the naval establishment; settled his accounts with the proper officer at Washington as such, and not as navy-agent; and was recognised as acting purser in the reports to congress concerning certain expenditures chargeable to that branch of the service. The act of congress fixes the salary of purser, when not otherwise provided for, at \$1500 a year. As the defendant performed all the duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services.

The circumstance that he held the office of navy-agent at the same time can make no difference; there is no law which prohibits a person from holding two offices at the same time. As a matter of policy, it would certainly be highly exceptionable, in most cases, as a permanent arrangement; but in the absence of any legal provision to the contrary, this appointment was valid. Indeed, it often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty; and if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not; provided they are faithfully discharged.

5. He is also entitled to the \$69 83 for office rent and clerk hire, for the twenty-five days which intervened between the day of his dismissal and the expiration of his quarter. He was entitled to office rent and clerk hire; and the shortest period for which, according to the usual course of business, he could rent an office, or engage a clerk, was

by the quarter; if before the expiration of the time, it was deemed proper to remove him from office, his successor was entitled to the use of the office and the services of the clerk, until the end of the quarter. They were engaged for the use of the officer, and not of the defendant individually; and as he had a right to engage them by the quarter, the expense justly belongs to the office, and ought not to fall upon the individual.

6. He is also clearly entitled to the small item of \$30 paid to midshipman Reany, and the objection to this item has very properly been abandoned by the government.

It is unnecessary to mention the remaining item of the defence, as it has been properly withdrawn by the defendant. As the alleged error in omitting to credit himself, in his navy-agent's account, with the sum of \$561 10, which he transferred to his debit in his purser's account, does not appear on the face of the accounts, and as this credit was not presented and rejected, it is not open to investigation here. If the error exists, it may be discovered by an examination of the accounts at Washington, and without doubt would be readily corrected by the accounting officers.

The jury will find their verdict for the balance due to the government, after deducting the credits and set-off to which the defendant is entitled as hereinbefore stated.

*Z. Collins Lee*, District Attorney, for plaintiff.

*D. Stewart* and *Wm. Pinkney Whyte*, for defendants.

## JACOB HUGG and JOHN M. BANDEL

vs.

## AUGUSTA INSURANCE AND BANKING COMPANY.

In an action on a policy of insurance, to recover, as for a total loss, the amount insured upon the freight on jerked beef, where it appeared that the vessel in which it was shipped was obliged to put into a port of distress, with the loss of a large portion of the beef, and that the balance was sold there, by an order of court, at a loss, in order to avoid further loss, and in consequence of the supposed inability of the vessel to proceed on her voyage: *held*, that there was not a total loss, when the beef was unladen at the port of distress, because a part of it still remained in specie, and had not been totally destroyed by the disaster.

There could be no recovery for a total loss, if the vessel could have been repaired within a reasonable time, and at a reasonable expense; and there was reasonable ground for believing that a portion of the beef might, by that means, be transported to the port of destination, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef.

If the vessel could not have been repaired in a reasonable time, and at a reasonable expense, at the port of distress, yet if another vessel or vessels could have been procured upon reasonable terms, which could have carried the beef to the port of destination, there could be no such recovery for a total loss.

A sale made under such circumstances, by order of court, upon the application of the master, will not entitle the plaintiffs to recover for a total loss, unless the loss was at that time total, independently of such sale.

But the loss was total, if the repairs would have produced such a delay as would, in all probability, have occasioned a destruction of the remaining portion of the cargo, before it could arrive at its port of destination, or that it would have become so damaged, as to endanger the health of the crew on the voyage, from the noxious effluvia arising from it.

It is also total, if the expense of making the repairs, at the port of distress, so as to fit the vessel for carrying cargo, would have exceeded the amount of freight which would have been earned, by completing the voyage, and delivering at the port of destination, the remainder of the cargo; provided another vessel could not have been procured, upon terms that would have enabled the master to save some portion of the freight, for the benefit of the underwriters.

But the plaintiff must show the existence of these obstacles, in order to enable him to recover for a total loss.

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The agent of the insurance company having made a change in the printed policy, by the following memorandum at the foot—"All losses under this policy to be settled agreeably to the terms of the Baltimore Insurance Company, the above notwithstanding:" held, that if this memorandum was made by the agent, acting within the scope of his authority, and before the policy was delivered to the assured and accepted by them, then the loss must be settled according to the terms of the Baltimore Insurance Company.

But if the agent was not acting within the scope of his authority, yet the plaintiff would be entitled to recover, if the jury find that the jerked beef was not a perishable article, in the mercantile sense of that term, as used in policies of insurance. And in determining this question, they must not look merely at the preparation and quality of this particular cargo, but must inquire and determine whether jerked beef, as an article of commerce, is a perishable one, in the sense in which the other articles enumerated in the policy are regarded as perishable.

As to the allowance of interest, in cases of this sort, in Maryland, the weight of authority seems to be in favor of leaving the question to the jury, where the sum due has never been liquidated, and is in dispute between the parties.

Circuit Court, April Term, 1851.

This was an action upon a policy of insurance on the freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, or a port in the United States, &c., to the amount of \$5000, upon all kinds of lawful goods, &c.; beginning the adventure upon the said freight, from and immediately following the lading thereof aforesaid, at Baltimore, and continuing the same until the said goods, wares and merchandise shall be safely landed at the port aforesaid.

The policy, which was executed at Augusta, Georgia, on the 16th April 1841, had the following memorandum at the foot:

"All losses under this policy to be settled agreeably to the terms of the Baltimore Insurance Company, the above notwithstanding."

GEO. C. MORTON, Agent.

Baltimore, Dec. 9th 1841.

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The terms of the Baltimore Insurance Company, in regard to payment of losses, were as follows: "And in case of loss, the same will be paid in *ninety days* after proof and adjustment thereof, deducting the amount of the premium, if then unpaid, and all sums due to the company from the insured, when such loss becomes due, provided such loss shall amount to *five per cent.* on the whole sum hereby insured, under which, no payment shall be made, except for general average."

The printed terms of the policy sued on were as follows: "And the said The Augusta Insurance and Banking Company of the City of Augusta, do hereby undertake and agree to make good and satisfy unto the said assured, all such loss or damage on the said goods, wares, and merchandise, so laden as aforesaid, not exceeding in amount the sum insured thereon, as shall happen or arise from any (of the aforesaid) causes and casualties, excepting as before excepted, the said loss or damage to be estimated according to the true and actual value of the said property hereby insured, at the time the same shall happen; and to be paid within ninety days after notice and proof thereof, made by the insured: provided always, that the said company shall not be liable to make good any partial loss, or particular average, unless the same shall amount to five per cent. upon the value of the property hereby insured."

The policy contained the usual memorandum enumerating the articles warranted free from average, and all others that were perishable in their own nature.

About four hundred tons of jerked beef were shipped on board the vessel, at Montevideo, which were to be delivered, in good order, at the port of Matanzas or Havana, to the consignees, they paying freight. The bill of lading was signed the 25th of April 1842. The vessel sailed from Montevideo the 29th of April, and after being out some forty-seven days, encountered a storm, and was driven on Gingerbread Ground, where she received considerable damage. The rudder was broken and unshipped, and as

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the extent of the damage could not be ascertained, it was deemed prudent, on consultation with the captain of a wrecking vessel and Bahama pilot, to go into Nassau, for the purpose of a survey and repairs; the wind was fair for that port, but ahead in the direction of Matanzas. The vessel was taken in charge by one of the wreckers; arrived at Nassau on the second day, about the 20th June; and grounded on the bar, while entering the harbor, under the charge of the king's pilot, by which she sustained a good deal of additional damage.

A part of the beef had been thrown overboard, to lighten the vessel, while on the Gingerbread Ground, and a much larger quantity while on the bar at Nassau. She had leaked, while on the ground at the former place, so that it was necessary to work the pumps every half hour; and at the latter place, there was seven or eight feet of water in the hold, with some fourteen men at the pumps.

The beef was so much damaged by the sea-water, that the board of health, at Nassau, refused to allow more than 150 tons to be landed. The rest was ordered to be carried outside the bar and thrown into the sea, for fear of disease; it was wet and very much heated, and not in a fit condition to be shipped; and the board of health recommended to the authorities that it should be removed as soon as conveniently could be.

The vessel was surveyed after the cargo was discharged, and it was found that the rudder was entirely broken off; the forefoot gone, and the keel greatly shattered and damaged; and it appears to have been conceded that she could not have been repaired at that port, so as to have carried on the cargo, and that if she could, it would have cost more than half her value. She was repaired so as to bring her home in ballast. It also appeared, that there was no vessel in port that could be procured to forward on the remaining cargo, even if it had been in a condition to be shipped.

The salvors libelled the vessel and cargo for salvage services, in the vice-admiralty court of the Bahamas, on the



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30th June 1842, to which the master put in an answer, on the 7th of July, insisting that the libellants were entitled to compensation for pilotage only, and not for salvage. The court, on the 18th July, decreed \$2100 salvage to the libellants, for services rendered to the vessel and cargo. Appraisers of the vessel, and cargo taken on shore, had been previously appointed; and on an examination of the cargo, it was found to be so much damaged, and in such a condition, that they advised an immediate sale, as it was deteriorating in value daily. The master assented to a sale, accordingly, which was ordered by the court, on his application, on the first of July. The net proceeds amounted to \$2664 92.

The time occupied in an ordinary voyage from Nassau to Matanzas is three days, and to Baltimore, ten. It was proved by several masters of vessels, that the navigation, at the place where the Margaret Hugg first grounded, and was visited by the pilots, was very hazardous, and that under similar circumstances, they would have considered it their duty to have carried the vessel into the harbor at Nassau. The regular premium for insurance of freight of the cargo covered by the policy for the outward voyage, was about one and one-eighth per cent.

At the first trial of this cause, the court was divided in opinion upon the questions of law presented to them, and the cause was taken to the supreme court upon a certificate of division. That court, at January term 1849 (see 7 Howard 595), gave as its opinion, upon the questions submitted to it:

1. That if the jury found that the jerked beef was a perishable article, within the meaning of the policy, the defendant is not liable, as for a total loss of the freight, unless it appears that there was a destruction, in specie, of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it

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had been re-shipped, before it could have arrived at Matanzas, the port of destination.

2. If the jury find that from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still that the plaintiff is not entitled to recover, as for a total loss of freight, provided his own vessel could have been repaired, in a reasonable time and at a reasonable expense, so as to perform the voyage, or could he have procured another at Nassau, the port of distress, and have transhipped the portion sold, in specie, to the port of destination.

3. That, assuming the plaintiff is entitled to recover, the defendants are not entitled to deduct from the (amount) insured, the freight earned on the voyage from Baltimore to Rio, upon the outward cargo, as the policy is not for one entire voyage round from Baltimore, out and home.

At the second trial in this court, the parties offered the following prayers:

*Plaintiffs' Prayers.*

1. The plaintiffs pray the court to instruct the jury, that if they shall find that the policy declared on, and offered in evidence, was made by the defendants, and through George C. Morton, the agent of the defendants, delivered, with the memorandum thereon, signed by him, to the plaintiffs, and countersigned by him, as by its terms required; and that at the time of effecting the said insurance, the plaintiffs were owners of the vessel insured, and so continued to be; and that said vessel sailed on the voyage described on the policy, and in the course thereof, met with the disaster and encountered the perils stated in the testimony, and that thereby it became necessary, with a view to the interest of all concerned, that the vessel should proceed to Nassau; and that she went thither, and

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going into that port, met with the disaster mentioned in the testimony, and that by all those disasters, she suffered the damage set forth in the testimony, and that repairs became necessary to render her seaworthy; that a portion of her cargo of jerked beef was thrown overboard for the safety of the vessel in the perils aforesaid; and another part of it, because it had become spoiled by wet from seawater, during the disasters aforesaid, and had become offensive and injurious to health, and in consequence of that, and of the orders of the local authorities of Nassau, was thrown overboard, and that the residue was landed and was sold under an order of the vice-admiralty court at Nassau, in manner as set forth in the proceedings in that court, given in testimony; and if the jury shall find that one-third of the quantity of the said cargo of jerked beef belonged to the owners, and two-thirds of said quantity to others, who were to pay freight for it, and that the freight aforesaid was of the amount of \$5000, the sum insured, and that said cargo was laden and carried, in the course of the voyage described in the insurance; then the plaintiffs are entitled to recover for a total loss of the freight insured, and to the full amount, with interest from the time it became payable under the terms of the policy of said insurance.

2. If the jury find the facts stated in the foregoing prayer, and shall further find that, from the condition of the landed beef, when landed, it was uncertain whether the same was sound and merchantable, or whether the same would continue to be so until the *Margaret Hugg* could be repaired, so as to carry the property, or a vessel or vessels could be found for shipping the same to its destination on the said voyage, and until when so shipped it should reach that destination, then the plaintiffs are entitled to recover for a total loss, the full amount and interest insured.

3. That if the jury find the facts set forth in the first of the above prayers, and shall also find that the *Margaret Hugg* could not be repaired, in a reasonable time, and be put in a condition for carrying on the cargo that was

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landed, nor another vessel or vessels be procured, within a reasonable time, and at a reasonable expense, for carrying it on to its destination, then the plaintiffs are, as aforesaid, entitled to recover as for a total loss.

4. That the plaintiffs are entitled to recover for a total loss, as aforesaid, if the jury shall find the facts of the said first prayer, and that it was for the interest of the insured and insurers that the landed cargo aforesaid, looking to its condition, and the uncertainty of the period of removing it, should be sold at Nassau, and not be transported to Matanzas; unless it shall appear to the jury, that the Margaret Hugg could have been repaired in a reasonable time, and at a reasonable expense, so as, with the cargo, to perform the voyage; or another vessel or vessels have been procured in a reasonable time, and at a reasonable expense, to transport it to its destination.

5. That the plaintiffs are entitled to recover, if the jury find the facts of the first prayer, for a partial loss of freight, for the portion of the cargo of jerked beef thrown overboard, notwithstanding it may appear to the jury that the vessel might have been repaired in a reasonable time, so as to carry on the part of the cargo landed at Nassau, or that another vessel or vessels might there have been procured, at a reasonable expense, to carry it on.

*Defendants' Prayers.*

1. The defendants pray the court to instruct the jury, that if they find that the jerked beef was a perishable article, within the meaning of the policy sued on, then the defendants are not liable, as for a total loss of the freight, unless they, the jury, are also satisfied, from the evidence, that there was, by the perils insured against, a total destruction in specie of the entire cargo of beef, so that thereby it had lost its original character of beef, at Nassau, the port of distress; or that the jury shall be satisfied from the evidence, that if it had been there re-shipped for Matanzas, the port of destination, such a total destruction of the

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entire cargo, annihilating its original character of beef, in consequence of the damage it had then received, would have been inevitable, before it could have arrived at Matanzas.

2. That although the jury may be satisfied from the evidence, that the condition of that portion of the beef sold at Nassau, was then such, that it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still that the plaintiffs are not entitled to recover, provided that their own vessel could have been repaired within a reasonable time and at a reasonable expense, so as to perform the voyage, or they could have procured another vessel at Nassau, and have trans-shipped, in specie, the portion of the cargo sold to Matanzas.

3. That if the jury find that the beef was a perishable article, within the meaning of the policy, then the burden of proving the other facts hypothetically stated in the defendants' first prayer, is upon the plaintiffs; that is to say, it is for the plaintiffs to satisfy the jury that such facts existed.

4. That under the defendants' second prayer, the burden of proof is upon the plaintiffs to show, that their own vessel could not have been repaired within a reasonable time, and at a reasonable expense, so as to perform the voyage to Matanzas; or that they could not have procured another vessel at Nassau, and have trans-shipped for Matanzas, in specie, the portion of the cargo sold at Nassau; that is to say, it is for the plaintiffs to satisfy the jury that said facts existed.

5. That the plaintiffs are not entitled to recover, except under the terms of the policy, as it issued from the defendants' office, and not under any supposed change of such terms, to be found in the written memorandum now appearing at the foot of the policy, dated the 9th December 1841, and signed George C. Morton, agent, because there is no evidence of his having had any authority from the

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defendants to make such memorandum, and the defendants, therefore, object to any such memorandum being given in evidence to the jury.

6. To entitle the plaintiffs to recover, they must show a loss within the meaning of the defendants' policy, irrespective of the said written memorandum mentioned in the next preceding prayer, because the only effect of that memorandum is, that when a loss occurs, within the meaning of the defendants' policy, it is to be adjusted within the terms of the policy used by the Baltimore Insurance Company, and not to bind the defendants for losses covered by the policies of that company, but not covered by the terms of defendants' own policy.

The court declined giving to the jury the instructions asked by either party, and instructed the jury as follows:

TANEY, C. J. The first question to be decided is, whether the plaintiffs are entitled to recover for a total loss of freight. In deciding this question, it is not material to inquire whether the loss is to be adjusted by the terms of the Baltimore Insurance Company, or by those of the Augusta Insurance Company, without regard to the memorandum of George C. Morton, at the foot of that policy.

1. There was not a total loss, when the cargo of the *Margaret Hugg* was unladen at Nassau, because a part of the jerked beef still remained in specie, and had not been totally destroyed by the disasters. And the plaintiffs are not entitled for a total loss, if the *Margaret Hugg* could have been repaired within a reasonable time, and at a reasonable expense, and there was reasonable ground for believing that a portion of this beef might, by that means, be transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef.

2. If this vessel could not have been repaired in a reasonable time, and at a reasonable expense, at Nassau,

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yet if another vessel or vessels could have been procured upon reasonable terms, which could have carried it to the port of destination, the plaintiffs are not entitled to recover.

3. The sale made by order of the court, having been made upon the application of the master, will not entitle the plaintiffs to recover for a total loss, unless the loss was at that time total, independently of such sale.

4. The loss was total, if the repairs would have produced such a delay, as would, in all probability, have occasioned a destruction of the remaining portion of the cargo before it could arrive at its port of destination; or that it would have become so damaged, as to endanger the health of the crew, on the voyage, from the noxious effluvia arising from it. It is also total, if the expense of making the repairs at Nassau, so as to fit the vessel for carrying cargo, would have exceeded the amount of freight which would have been earned by completing the voyage, and the delivery at Matanzas of the remaining portion of the cargo; provided another vessel or vessels could not have been procured at Nassau, upon terms that would have enabled the master to save some portion of the freight, for the benefit of the underwriters. But in order to justify the sale, and entitle the plaintiffs to recover for a total loss, it is incumbent upon them to show that these obstacles existed, and prevented him from completing the voyage.

If, under these instructions, the jury find that the plaintiffs are not entitled to recover for a total loss, the next question is, whether they are entitled to recover for a partial loss.

5. Upon that question, the court instruct the jury, that if the written memorandum at the foot of the policy, was made by George C. Morton, the agent of the company, acting within the scope of the authority conferred on him by the company, and was made before the policy was delivered to the plaintiffs and accepted by them, then the loss mentioned in the testimony must be settled according to the terms of the policy, at that time adopted and used

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by the Baltimore Insurance Company. And according to that policy, the plaintiffs are entitled to recover whatever loss of freight they may have actually sustained by the disasters mentioned in the testimony, provided such loss exceeds five per cent., and was occasioned by one of the perils enumerated and insured against in the Augusta policy.

6. If the jury find that the said George C. Morton was not acting within the scope of his authority, in making and signing the memorandum before mentioned, yet the plaintiffs are entitled to recover the amount of loss of freight actually sustained by them, if the jury find that jerked beef is not a perishable article, in the mercantile sense of the term, as used in policies of insurance; but in determining this question, they are not to look merely at the preparation and quality of this particular cargo, but must inquire and determine whether jerked beef, as an article of commerce, is a perishable one, in the sense in which the other articles enumerated in the policy of the Augusta Company, are regarded as perishable.

As to interest, in case the verdict was for the plaintiffs, the court were of opinion that, although in some of the states, and in the English courts, interest would be allowed as a matter of course, in a case of this kind, yet, in Maryland, the weight of authority appeared to be in favor of leaving the question to the jury, where the sum due had never been liquidated, and was in dispute between the parties. The jury were, therefore, instructed, if they found for the plaintiffs, to allow interest or not, as in their judgment they might deem just, upon the evidence before them.

Verdict and judgment for the plaintiffs

*C. F. Mayle*, for plaintiffs.

*D. Stewart*, for defendants.



## ROYSTON BETTS

*vs.*

## FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA.

In an action on a policy of insurance, to recover for a loss to goods, sustained by fire: *held*, that the plaintiff was not entitled to recover, if he designedly, and with a fraudulent intent, withheld or delayed to deliver to the defendant, the necessary information, invoices, documents and proofs, or any of them.

Nor was he entitled to recover, if he was wilfully guilty of false swearing in his affidavit furnished to the defendant, or presented the affidavit of any other person, or made any statement to the defendant, knowing it to be false.

But that the omission to furnish the defendant with such information and documents, or delay in presenting them, or any of them, was no bar to the plaintiff's recovery, if such omission or delay were occasioned by loss of the papers, or by oversight, mistake or accident, and without fraudulent intention.

Nor was any error of fact contained in the plaintiff's affidavit, or in any other affidavit furnished by him, a bar to his recovery, if he acted in good faith, and believed the said affidavits, or other papers, to be true, when he furnished them to the defendant.

Circuit Court, November Term, 1851.

This was an action instituted by the plaintiff, on a policy of insurance on goods, to recover for damages sustained by fire. The defendant's prayers, to which allusion is made in the instructions given by the court, are not to be found among the papers to the cause.

TANEY, C. J. The first and second instructions prayed for, were admitted by the plaintiff to be correct, and were given to the jury. The third, fourth and fifth are refused, and the court instruct the jury—

1. That the plaintiff is not entitled to recover, if he designedly, and with a fraudulent intent, withheld or delayed to deliver to the defendant, the information, invoices,

documents and proofs, or any of them, mentioned in the defendant's prayers.

2. Nor is he entitled to recover, if he was wilfully guilty of false swearing in his affidavit furnished to the defendant, or presented the affidavit of any other person, or made any statement to the defendant, knowing it to be false.

3. But the omission to furnish the defendant with the information and documents above mentioned, or delay in presenting them or any of them, is no bar to the plaintiff's recovery, if the jury find that such omission or delay was occasioned by the loss of the papers, and by oversight, mistake or accident, and without any fraudulent intention.

4. Nor is any error of fact contained in the plaintiff's affidavit, or in any other affidavit, furnished by him (if any such error is contained in them), any bar to the plaintiff's recovery, if he acted in good faith, and believed the said affidavits, or other papers, to be true, when he furnished them to the defendant.

Verdict and judgment for the plaintiff.

*C. F. Mayer, J. Nelson and W. J. Ward*, for plaintiff.

*R. Johnson, St. George W. Teackle, Dobbins and Talbott*, for defendant.

DAVID MASON and JOHN E. TULLIS

vs.

GEORGE P. KANE, Collector.

The tariff acts of 1799 and 1845, do not prevent the actual owner of goods imported, from suing for the recovery of duties paid under protest by the consignee, and do not require such suits to be brought in the name of the consignee.

The tariff act of 26th February 1845, provides that no action to recover duties paid under protest, shall be maintained against a collector, "unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, *setting forth distinctly and specifically* the grounds of objection to the payment thereof." A protest under this act, objecting in general terms to the additional duty exacted, but assigning no reason for the objection, will not warrant the institution of a suit to recover back the duties objected to, even though such duties were illegally exacted.

Circuit Court, April Term, 1851.

This action was instituted on the 22d of October 1850, against the collector of the port of Baltimore, for the recovery of duties paid under protest. The facts sufficiently appear from the following statement of facts, agreed on by the counsel in the cause, and the opinion of the court.

*Statement of Facts.*

1. It is admitted, that the plaintiffs are residents of Savannah la Mer, Jamaica, and aliens, and owners of the pimento, mentioned in the above case; and that Spence & Reid, merchants of Baltimore, were the consignees of said pimento, and entered the same, and paid the duties exacted upon them by the defendant, under protest in writing, signed by them.

2. It is further admitted, that on or about the 21st of September 1849, the plaintiffs consigned, from Savannah la Mer, the said pimento, as per invoice and bill of lading,

to said Spence & Reid, and that the invoice upon which it was entered, sets forth correctly the price paid by plaintiffs, at the time the same was purchased.

3. It is also agreed, that the custom-house papers relating to this case, or proper copies of the same, shall be read in evidence by either party, and that oral evidence may likewise be given at the trial of this cause.

Upon the foregoing statement of facts, and such other evidence as may be produced by either party at the trial of the case, it is agreed, that the following questions shall be raised and submitted to the court for its opinion :

1. Whether the plaintiffs in this case can maintain the action, by reason of the act of 26 February 1845, or any other acts of congress.

2. Whether the appointment of the merchant appraisers, is not such an award as is final and conclusive on the plaintiffs, as to the value whereon the duty should have been estimated.

3. Whether the return of the government weighers of the gross weight of the pimento, being 87,139 pounds is conclusive ; and the deduction therefrom for tare, or the weight of the bags, should be the weight shown by the invoice ; or should be the tare returned by the said weighers, 2617 pounds, which is three per cent. on the gross weight.

4. Whether the additional duty or penalty of \$899, exacted in this case, or any part thereof, may be recovered by the plaintiffs, inasmuch as a portion of the pimento, to wit, four hundred and twenty-three bags, has been exported, as will appear from the export entry thereof.

If, upon the foregoing questions, the opinion of the court should be in favor of the plaintiffs, then a verdict and judgment shall be entered for the plaintiffs, for the damages claimed in the narr. with costs ; but if in favor of the defendant, then for the defendant with costs.

And it is further agreed, that if the judgment should be in favor of the plaintiffs, the amount including interest for which the verdict and judgment shall stand, shall be here-

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after calculated in conformity with the principles which the court shall decide to govern the case, and the said verdict and judgment corrected accordingly.

*Brown and Brune*, for plaintiffs.

*Z. Collins Lee*, for defendant.

*Opinion of the Court.*

TANEY, C. J. This suit is brought against the collector of the port of Baltimore, to recover certain duties, which the plaintiffs allege were overcharged upon a cargo of pimento, imported from Savannah la Mer, in Jamaica. The official appraisers, acting under positive directions from the secretary of the treasury, estimated the value of this pimento much higher than that in the invoice; and upon a reference to merchant appraisers, although they valued it lower than the officers of the government had previously done; yet, the price at which they assessed it, exceeded the invoice price more than ten per cent., estimating the value by the pound, without regard to the difference in the dutiable quantity, arising from the difference in the tare allowed in the invoice, and that allowed by the official weighers; and upon this appraisement by the merchant appraisers, the penal duty of twenty per cent. was exacted by the collector, upon the whole cargo, and paid under protest by the consignees. The pimento was warehoused upon its arrival, and a part of it remained in the warehouse when the penal duty was demanded; and a large portion of it was re-exported and never withdrawn for consumption or sale in this country.

The suit is brought by the owners of the cargo, who reside in Jamaica, and not by the consignees, who paid the money and signed the protest; and it is objected by the defendant, that this suit cannot be maintained by a foreign owner, but must be brought by the consignee; that under the acts of 1799 and 1845, the consignees, for all purposes

connected with the payment of duties, were to be regarded as owners; and that the principles and doctrines in relation to principal and agent, in the ordinary concerns of life, do not apply to a case of this kind.

This is certainly a question of some difficulty. But we do not think that the language of the act of 1845 requires this construction; and the motives of policy which evidently introduced the provision upon this subject in the act of 1799, can hardly have influenced the provisions of the act of 1845, under which this suit is brought. We see no inconvenience that can arise to the collector, or the public, by permitting the owner to maintain the suit in his own name, instead of suing in the name of his agent or consignee; the payment by the consignee, is the payment by the principal; and the protest of the consignee, the protest of the principal, if he thinks proper to adopt it. We think the practice in some of the circuits has sanctioned suits by the foreign owner, in cases of this description; and as this practice is consistent with a fair construction of the act of 1845, and no injustice or inconvenience can arise from it, the court are of opinion, that this objection must be overruled.

But the objection to the sufficiency of the protest, is a much more serious one. Some question has been made as to the charges to which it objects; but it is very clear that it applies altogether to the additional and penal duty, which appears to have been demanded and paid on the day of the protest; it objects to this demand in general terms, without specifying any particular grounds of objection. But it is now insisted, in support of the action, that the demand was illegal:

1. Because the merchant appraisers assessed the value at the time of the shipment, and not at the time of the purchase.

2. Because they did not actually inspect the pimento.

3. That if their valuation was lawfully made, it does not exceed the value in the invoice ten per cent., taking into

consideration the whole cargo, and the difference in the dutiable weight, arising from difference between the tare claimed in the invoice, and that allowed by the official weighers; and—

4. That if a penal duty was incurred upon the part of the cargo withdrawn for sale and consumption, it was not incurred upon the portion of it which remained in the warehouse and was re-exported to a foreign country.

But none of these objections are set forth in the protest; it objects, as we have already said, in general terms, to the additional duty exacted on that day; that is, the whole penal duty, but assigns no reason for the objection. Now, the act of 26 February 1845, in express terms, provides that no action of this kind shall be maintained against a collector, "unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and protest in writing against it; the claimant must do more; he must set forth, in his protest, the grounds upon which he objects, *distinctly and specifically*; and these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious; in the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties; and the object of this provision is, to prevent a party from taking advantage of such objections, when it is too late to correct them, and to compel him to disclose the grounds of his objection, at the time when he makes his protest.

The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pi-

mento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice, and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality, which would lower the value, nor express a wish to have it inspected; they offered to prove that it was bought at the price at which it was invoiced, and that such was then the market-price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly. There is not the slightest reason to suppose that their appraisal would have been, in any degree, influenced or changed by their actual inspection of the article; and if this objection had been stated in the protest, the error could have been immediately corrected, before the duties were exacted; but it is now too late. If this oversight be fatal to the appraisal, and renders it invalid, then the public lose not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned, if they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department of the government, the errors could have been corrected without the expense of litigation, and the duties which the law imposes secured to the public.

It is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest; for this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States; the money is in the treasury, and must be paid from the treasury, if the plaintiffs recover. As the United States cannot be sued and made defendants in a court of justice without their consent,



they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. In the exercise of this power, they have granted this privilege, in the form of a suit against the collector, where duties are supposed to be overcharged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; stating also at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent; and as it was not performed in this instance, the present action cannot be maintained, even if the duty exacted were not legally due.

It is unnecessary, therefore, to inquire whether the objections now made would have been valid if set forth in the protest. If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant; but no action can be maintained under the act of 1845. The verdict must, therefore, be for the defendant.

Verdict for defendant.

*Brown and Brune*, for plaintiffs.

*Z. Collins Lee*, District Attorney, for defendant.

## EPHRAIM LARABEE

*vs.*

## JAMES CORTLAN and JAMES CORTLAN, Jr.

In an action for the infringement of a patent, brought by one patentee against another, the validity of the defendant's patent is not in question. The question is, whether the machine made by the defendant, in the manner described in his specification, is an infringement of the plaintiff's patent; for although the defendant's patent may be invalid and void, yet he is not liable to the plaintiff, unless the machine constructed by him infringes upon the right secured to the plaintiff.

Where, in an action for the infringement of the plaintiff's patent for a shower-bath, it appeared, that substantial parts of the combination claimed by the plaintiff as his invention, were not used by the defendant; and that the combination of a movable reservoir, with a jet-bath, in the machine of the latter, differed materially, in several of its component parts, from that of the former, and also in the manner of their adjustment and arrangement in the machine; and that his bath differed also in the manner in which the shower was delivered and administered to the bather; and that although the same end was accomplished, it was not accomplished by the same means and by the same combination: *held*, that there was no evidence of an infringement, by the defendant, of the rights secured to the plaintiff by his patent.

Circuit Court, April Term, 1851.

The plaintiff sued the defendants for an infringement of his patent-right for an improvement in shower-baths. The defendants also held a patent for the bath constructed by them. The suit was brought on the 24th of April 1849, and was tried at April Term 1851.

A bath, proved to have been in use in New York, in 1843 (prior to the date of the defendants' patent), was exhibited to the jury, called the French bath. It consisted of a fixed reservoir, about five feet from the ground; the water from which, on opening a stopcock, flowed into a vertical tube or back-bone, reaching nearly to the ground,

of uniform size throughout, and three-fourths of an inch in diameter; this tube communicated with tubular ribs or arms, in which were small holes at short intervals, from the back-bone to their extremities; from these holes the water was thrown in jets, upwards and inwards, so as to fall upon and strike the back and sides of a bather seated on a stool within the embrace of the arms. The tubular ribs were three in number, each capable of being removed, so that the bather could regulate the number of jets playing on him, and the height at which they were discharged. To this bath a tube, also capable of being removed at pleasure, was attached, above the jet-tubes, with a rose at the end, so that a vertical or common shower-bath could be taken on the bather's head; and by increasing the altitude of the frame in which the bath was placed, a bath could be taken by a person standing at any height he desired.

One of the baths constructed by the defendants, according to their specification, on being produced in court, exhibited the following construction: It had two tubular arms, of the general form of those of the French bath, that communicated with the reservoir, which, in this case, was movable, by a vertical tube or back-bone, that moved with the reservoir, the upper division of which, reaching from the reservoir to the upper arms, was larger than the lower division, extending to the lower arms. The diameter of the upper division was between  $1\frac{3}{8}$  and  $1\frac{7}{8}$  inches, and of the lower  $1\frac{3}{8}$  of an inch. It was proved by the foreman of the defendants' shop, who manufactured their baths, that the proportions of the parts of the back-bone was a matter that gave them trouble to ascertain, experiments being necessary; owing, as he stated, to the want of accurate knowledge from books, a want that prevented the result being obtained by calculation.

The plaintiff produced to the jury, for illustration, one of the baths constructed by himself, under his patent, exhibiting the following construction: The reservoir com-

municated with his jet-pipes by means of a sub-reservoir and four tubes; the diameter of the sub-reservoir being  $9\frac{1}{4}$  inches on the outside, and each of the four pipes through which the water flowed to the tubes containing the jets, three-fourths of an inch. The water passed from the main to the sub-reservoir by a valve, which opened upwards and closed downwards, operated by a lever and cord attached thereto, and thence descended downwards through the upright tubes into the horizontal ones; these horizontal or discharging tubes were connected together by short pieces, at their ends, so as to form an oblong octagon, but were stopped up at the place of joining, so as to prevent the water from passing from one tube to the others.

It was proved, that the plaintiff's first bath was sold in the spring of 1848, and the defendants' in the fall of the same year. It was also proved, that the plaintiff had filed a caveat in the patent office, on the 12th of May 1848, to protect his invention. It was admitted that, in the mere uniting, by any mechanical means, of tubes with the reservoir that supplied them, there was no difference in principle or mode of operation, arising from the fact that one reservoir was a stationary and the other a movable one.

On the above facts, the plaintiff contended, and prayed the court to instruct the jury—

1. That his patent was for the combination of a jet-bath with a movable reservoir, the two moving together independently of the particular mode of connection; the result being a machine consisting of the above two elements, united in the manner described in the specification, or in any convenient mechanical way, and operating to enable a bather, of whatever height, to adjust and enjoy a jet-bath suited to his stature.

2. That supposing this to be the true construction of the plaintiff's patent, the fact that a movable reservoir, supplying a common shower-bath, had been patented by

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Stephen Bates, on the 12th of October 1843, for the use of which the plaintiff had no license, did not invalidate or affect his patent, otherwise than to subject him to an action at the suit of said Bates, if he used the movable reservoir, patented by him, without his license.

3. That admitting the above construction of the patent to be wrong, and that the plaintiff's patent was for the particular mode, and not the mere fact of the combination, to wit: the sub-reservoir and four connecting tubes; yet, if this mode of connection produced, for the first time, a new and useful effect, in the instantaneousness and promptitude with which the water was supplied from the movable reservoir to the jets connected therewith; and the same effect was produced, substantially, by means substantially the same in principle and mode of operation, in the defendants' bath, differing in this respect from the French bath, or any other jet-bath offered in evidence, except the plaintiff's, then there was an infringement, for which the plaintiff was entitled to damages.

Whereupon the court (HEATH, J., concurring) instructed the jury as follows:

TANEY, C. J. 1. The validity of the defendants' patent is not in question in this case. The question is, whether the shower-bath exhibited to the court and jury, which is admitted to have been made by the defendants in the manner described in their specification, is an infringement of the plaintiff's patent; for although the defendants' patent may be invalid or void, yet, he is not liable to this action, unless the bathing-machine constructed by him infringes upon the rights secured to the plaintiff by his patent.

2. The plaintiff's patent is not for the whole machine, consisting of the movable reservoir and jet-bath united together and forming one entire machine; but it is for the combination of the two, by connecting them together in the manner described in his specification; this is the im-

provement he claims, and which is secured to him by his patent. It is a combination of known elements and powers, in a new and specified form, in order to produce a certain effect; and the invention consists altogether in the manner and form in which the improvement is constructed, and the shower produced and delivered upon the body.

3. It is admitted, that a shower-bath composed of a reservoir combined with jet lateral tubes, was known and in use before the plaintiff made his invention; and also a bath with a movable reservoir, but without movable jets attached to it; and that in both of these baths the shower upon the head fell vertically from the perforated bottom of the reservoir. It is further admitted, that the mode of uniting the tubes for the lateral jets, with a movable reservoir, by any mechanical means, in order to make the reservoir and lateral tubes move at the same time and by the same force, does not differ from the mode of uniting fixed lateral jet-tubes to a fixed reservoir. The mere act, therefore, of fastening the lateral jet-tubes to a movable reservoir, by ordinary mechanical means, so as to make them move at the same time and by the same force, is not a patentable invention, nor does the plaintiff claim it as such in his specification.

4. A part of the combination claimed by the plaintiff, as his improvement, is, that the reservoir or chamber should not be perforated, and that the shower, whether intended for the head, or the shoulders or body, should be delivered altogether from the lateral jet-tubes; and that the water should descend from the reservoir or chamber, by four separate tubes, to the horizontal discharging tubes, so as to make the jets (when the bather desires it) all act, at the same instant and with the same force, upon every side of the body, while the bather stands still under the reservoir or chamber; his head being encompassed by the oblong octagon formed by the four horizontal tubes with the short connecting pieces.

5. In the defendants' bath, both as described in their

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specification, and as exhibited to the court and jury, the reservoir is perforated at the bottom, and when the head is intended to be bathed, the water falls perpendicularly from the reservoir, and does not issue from jet-tubes at the sides; and the water for the lateral jet-tubes descends from the reservoir, by one conduit or large tube, at the back, and flows into the lateral jet-tubes which are united to it on each side; the lateral tubes being curved and not meeting in front, but leaving a space open between them sufficiently large for the bather to enter, and making it necessary for him to be in motion, while bathing, and to turn his body, from time to time, when he desires to receive the lateral shower with equal force and abundance, before and behind, and on each side of his body or limbs.

6. It appears then, that substantial parts of the combination claimed by the plaintiff, as his invention, are not used by the defendants; and that the combination of the movable reservoir with the jet-bath, in the machine of the latter, differs materially, in several of its component parts, from that of the former; and also in the manner of their adjustment and arrangement in the machine; that his bath differs also in the manner in which the shower is delivered and administered to the bather; and that although the same end is accomplished, it is not accomplished by the same means and by the same combination. If the jury believe the facts stated in the exception to be true, the bath of the defendants exhibited to the court and jury, is no evidence of the infringement of the rights secured to the plaintiff by his patent; and therefore, he is not entitled to recover in this action. The instructions prayed by the plaintiff are refused.

Verdict for defendants.

*J. H. B. Latrobe*, for plaintiff.

*Wm. Schley*, for defendants.

EDWIN BARTLETT

*vs.*

GEORGE P. KANE, Collector.

In an action against the collector of customs, to recover duties paid under protest, on an importation of Peruvian bark, where it appeared, that the official appraisers, under instructions of the secretary of the treasury, had predicated their valuation of the bark on the quantity of sulphate of quinine produced by the several packages in the invoice: *held*, that the secretary of the treasury had no power to fix a chemical analysis of bark as the only test of its dutiable value.

The law of congress fixes the duties upon the market value at the port of exportation; the purchaser must and can only look at the fair market value of the article among those trading in it at the port of exportation; and he can only be required to adopt the methods usually adopted by merchants in making purchases.

But still the appraisers, when they suspect a wrong done to the government, have a right to employ this means as a test by which, with the other knowledge and information in their power, they may be able to arrive at a correct estimate of the true value of the article imported.

An appeal from the decision of the official appraisers to that of merchant appraisers was made by the importers; but on the official appraisers demanding of them the production of all documents connected with the importation, they refused to comply with the demand, withdrew the appeal, and paid the duties under protest: *held*, that the parties, by withdrawing their appeal, and refusing to produce the papers called for, had fixed the correctness of the appraisalment.

The appraisers had the right to call for these papers, whether with the view of correcting their own judgment, if erroneous, or of laying them before the merchant appraisers, in the event of a prosecution of the appeal.

A refusal to produce papers admitted to be in a party's possession, raises the strongest inference that the papers, if produced, would operate against the person holding them.

The act of congress (30th August 1842, sect. 17) makes it, in such a case as this, conclusive proof, that the papers, when produced, would be demonstrative against the pretensions of the party having them in his possession.

A demand for these papers could properly be made by the official appraisers, even after their own decision had been given.

Where the penalty of twenty per cent. is imposed on an importation, because of the excess of the market value, over the invoiced value, which is paid under protest, and such importation, having only been entered for ware-



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housing, is afterwards exported elsewhere for sale: *held*, that the importer was not, for this reason, entitled to recover back the amount of the penalty so paid.

Circuit Court, April Term, 1852.

The facts of this case appear from the following statement of facts and the opinion of the court.

*Statement of Facts.*

It is admitted that, in the month of September 1849, the barque St. Joseph brought to the port of Baltimore, six hundred and fourteen seroons of Peruvian bark, shipped at Arica, in Peru, in January preceding, and consigned to the plaintiff, residing in New York, as appears from the invoice, a copy of which is herewith filed, marked A. That said bark belonged to Messrs. Pinto & Co., of Arica, and was obtained by them under the contract and circumstances shown by the testimony taken under the commission in the above cause.

It is admitted that, on the arrival of the St. Joseph in Baltimore, Messrs. Birckhead & Pearce, the agents of the plaintiff, entered two hundred seroons, of the first quality, of said bark, for consumption, and the rest of the invoice for warehousing; and that subsequently, the defendant caused the whole of said importation to be appraised, and that the official appraisers, acting in obedience to instructions from the secretary of the treasury in reference to the appraisement of this article, proceeded to ascertain the quantity of quinine in said bark, by chemical analysis, in order to fix therefrom the dutiable value of said bark.

It is admitted, that said appraisers, in accordance with said analysis, reported that the one hundred and thirty-four seroons of third quality, mentioned in the invoice, were not undervalued; but that upon the other two parcels, valued in the invoice and entry at \$49,737 Peruvian, or \$45,758  $\frac{94}{100}$  American currency, they reported a deficiency of dutiable

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value, in the amount declared in the invoice and entry, of \$7339 $\frac{56}{100}$ , upon which increased value, a duty of fifteen per cent., amounting to \$1100 $\frac{93}{100}$ , was exacted by the defendant, and likewise an additional duty, by way of penalty for undervaluation, of twenty per cent. on the appraised value, amounting to \$10,799 $\frac{49}{100}$ , was likewise exacted, making together the sum of \$11,900 $\frac{33}{100}$ , which, in addition to the duty of fifteen per cent. on the dutiable value declared in the invoice and entry, was paid by the plaintiff under protest, to obtain the possession and control of his said goods.

It is further admitted that, of the two hundred and fifty-four seroons of first quality bark which were entered for warehousing, twenty-five were re-shipped to Amsterdam, by the plaintiff, from Baltimore, and one hundred and three were transported to New York (whence one hundred of them were also re-shipped), and thus said one hundred and twenty-five seroons became entitled to drawback, which was paid to the plaintiff, but the penalty of twenty per cent. for undervaluation on these seroons has never been returned.

It is agreed, that the instructions of the secretary of the treasury, having reference to the questions involved in this case, may be referred to by either party, for whatever purpose they may be legally available, as well as all official documents from the custom-house.

That the official appraisers, on the 6th of October 1849, notified Messrs. Birkhead & Pearce that they should require the production of all papers or documents relative to said importation, and Messrs. Birkhead & Pearce notified the plaintiff, Mr. Bartlett, of this requisition of the official appraisers, whereupon Mr. Bartlett, by his letter of the 11th October 1849, declined the production of the papers, &c., demanded, and directed Messrs. Birkhead & Pearce to withdraw the appeal they had made, and to pay the duties and penalty required, under protest; and at the same time proposed, as a final settlement, to pay the additional

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duties, provided he was released from paying the penal duty of twenty per cent.

This statement is subject to corrections by either party as to details or explanation, as the oral testimony in the case, at the trial, may require.

*Brown and Brune*, for plaintiff.

*Z. Collins Lee*, for defendant.

*Plaintiff's Prayers.*

The plaintiff prays the court to instruct the jury:

1. That until superseded by a valid appraisement, the dutiable value of the plaintiff's goods, mentioned in the invoice, duly verified, and declared on the entry, must be deemed the true dutiable value of such goods.

2. The plaintiff further prays the court to instruct the jury that the mode pursued by the appraisers, as stated in their evidence, of ascertaining the foreign dutiable value of the plaintiff's import of bark, per St. Joseph, was illegal, and their appraisement void.

3. That the non-compliance by the plaintiff with the requirements of the appraisers, contained in their letter of the 6th October 1849, did not make valid the illegal appraisement of the plaintiff's goods previously made and then still appealed from.

4. That the seventeenth section of the act of 1842, which declares that the refusal of a consignee to produce any papers which the permanent appraisers may call for, shall render the appraisement which they may make final and conclusive, applies only to appraisements made after such refusal, and therefore can have no effect in this case.

5. That the additional duty exacted and retained on the parcels entered for warehousing, and entitled to debenture and exported, was illegally exacted.

6. That under the contracts between the Messrs. Pinto & Co. and the Bolivian Government, the plaintiff's goods

are not to be considered goods "actually purchased," within the meaning of the eighth section of the act of 1846, and therefore, the penalty prescribed by that act, and exacted in this case, was illegally exacted, and may be recovered back in this suit.

*Defendant's Prayers.*

Upon the statement of facts and other evidence in this case, the defendant, by his counsel, asks the following instructions to the jury :

1. That the plaintiff is not entitled to recover the amount claimed in this action, because he has not complied with the requisitions of the act of congress in such cases provided.

2. That the value of the bark imported and appraised in this case, was the true value, with the costs and expenses added thereon; and was ascertained by the official appraisers, in the mode authorized by law and the instructions of the treasury department to the collectors in such cases.

3. That the penal duty of twenty per cent., imposed by the act of congress of 1846, for an undervaluation of goods in invoices imported into the United States, is not a duty, in the ordinary meaning of *duties* or imposts, but a *penalty* or fine inflicted for a violation of the revenue laws of the United States, and is not, therefore, subject to drawback or debenture, upon a re-shipment of the goods which have been subjected to this penalty.

4. That upon all the evidence in this case, the defendant acted in compliance with the laws of the United States and instructions from the treasury; and though the official appraisers of the United States examined the bark of the plaintiff, and also had it analyzed by a chemist appointed by the government, and compared its analysis and value with that of a similar cargo of bark imported from the same country by Wyman, Appeton & Co., and brought into the port of Baltimore about a month before the bark

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of the plaintiff was entered; yet, if from the evidence in this case that the plaintiff was duly notified, by the official appraisers, of the undervaluation of his bark, and their increase of the marketable value, after such examination, analysis and comparison, and that he was required by the appraisers to furnish papers, documents or other evidence, for the purpose of satisfying said appraisers as to the value of said importation, and *refused* to comply—and afterwards, or at that time, withdrew his appeal to the merchant appraisers, and then paid the duties under protest—he is not entitled to recover.

*Opinion of the Court.*

TANEY, C. J. The facts of this case are these: In the month of January 1849, Messrs. Pinto & Co., of Bolivia, shipped from the port of Arica, in Peru, a quantity of bark, grown in Bolivia, but known under the name of Peruvian bark. These shippers had, in the years 1845 and 1846, contracted with the Bolivian government for a monopoly in the trade of this article, for the term of several years, for which they were to pay the government a certain price. One of these contracts states that “*Tabla Calisaya bark, which is cut from the body of the tree, being of three times the value of Canato bark, which is cut from the branches, and this by reason of the greater quantity of the salts, the active principle, contained therein.*” The bark, thus procured, is sent to Tacna, and thence usually to Arica, a port in Peru, from which port it is shipped abroad; from this port are also sent quantities of this bark, which are obtained clandestinely, and brought to Arica; sometimes this bark is shipped from a Bolivian port, but this much increases its cost at the port of shipment.

The bark in question was, by Pinto & Co., dispatched from Arica, in the ship *San Josef*, destined for Baltimore, to the plaintiff, residing in New York; and he consigned it to Messrs. Birckhead & Pearce, of Baltimore, by whom it

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was here entered at the custom-house, in the month of September 1849. In the invoices accompanying this shipment, the first quality, or Tabla Calisaya, was invoiced at \$70 per quintal.

About a month before the arrival of the San Josef at Baltimore, another invoice of bark had arrived in Baltimore, in the barque George and Henry, to different consignees, which had left the port of Arica, about two months after the date of the bill of lading of the cargo in question, and there was evidence that a rise, throughout the whole of 1849, had taken place in the price of this kind of bark in the ports of South America. The first quality of bark received by the George and Henry was invoiced, some at eighty cents and some at ninety. On the arrival of the plaintiffs' cargo, Messrs. Birkhead & Pearce entered it in the usual way, and samples of it were submitted to the appraisers for examination; neither of the appraisers was a good judge of the value of this article, but directed it to be subjected to a chemical analysis, by the government chemist, and having subjected the bark of the other shipment to a like process, they found the cargo by the San Josef, which was invoiced at \$70 per quintal, to contain more sulphate of quinine than the bark received by the George and Henry, which was invoiced at a much higher price, this sulphate of quinine being the active principle of the bark. To this test the appraisers felt themselves bound to subject this bark, in consequence of the orders of the treasury circular of the 2d day of November 1848, in these words:

Copy 1. Treasury Department, November 2, 1848.

SIR: I have to acknowledge receipt of your communication of the 21st ult., with the report of the U. S. appraisers, in relation to an importation by Messrs. Birkhead & Pearce, of Baltimore, per barque "George and Henry," from Arica. It appears from the documents submitted, that the valuation of the article in question, was predicated by the

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appraisers on the quantity of sulphate of quinine produced by the several packages in the invoice; a portion of the same, invoiced at \$65, found, on analysis by Dr. Stewart, the special examiner, to produce  $2\frac{24}{100}$  per cent. of quinine, being taken as the basis of the value of the others (with certain exceptions), which, by the analysis, produced an equal proportion of quinine.

It being the opinion of this department, that the course pursued by the U. S. appraisers was the true one, under the circumstances, and is sustained by law, you are directed to estimate and adjust the duties accordingly.

Very respectfully, &c.,

R. J. WALKER, Secretary of Treasury.

WILLIAM H. MARRIOTT, Collector of Customs, Baltimore.

After calling for the bill of lading, which was sent to them, the appraisers determined that the duty upon the bark should be so increased; that it became liable to the additional or penal duty of twenty per cent., and made to the collector the following report:

Appraisers' Office, Baltimore, October 3, 1849.

The undersigned report to the naval officer an addition to E. Bartlett, of New York's, invoice of bark, per barque St. Joseph, from Arica, entered by Birckhead & Pearce, on 21st ult., viz:

J. T. P. 454 seroons bark, weighing 681 quintals,	
at \$10 98 . . . . .	is \$7204 98
J. P., 26 ditto. ditto. 39	
quintals, \$14 82.62	578 22
	<hr/>
	\$7783 20
Commissions $2\frac{1}{2}$ per cent.	194 58
	<hr/>
Peruvian currency	\$7977 78 @ 92 cts. \$7339 56
	<hr/>
Duty 15 per cent.	\$1100 92
	M. McBLAIR.

*Bartlett v. Kane.*

E. Bartlett, New York, per St. Joseph, entered by  
 Birkhead & Pearce, 494 seroons bark; 681 quintals,  
 at 70 cts., is . . . . . \$47,670 00  
 Commissions  $2\frac{1}{2}$  per cent. . . . . 1,191 75  
\$48,861 75

The 13 seroons bark, per George and Henry, which cost  
 80 cents per pound, produced  $2\frac{7}{10}\%$  per cent. of quinine.

The above bark, per St. Joseph, is invoiced at 70 cents,  
 and produced  $2\frac{7}{10}\%$  quinine per cent., and consequently,  
 ought to have been invoiced 80 58  
70

Difference 10 58

If this addition be made, it will stand as follows:

681 quintals at  $10\frac{5}{10}\%$  per quintal, is . . . \$7204 98  
 Commissions  $2\frac{1}{2}$  per cent. . . . . 180 12  
\$7385 10

J. P., 26 seroons, invoiced at 53 cents, produced  $2\frac{3}{10}\%$  per  
 cent. of quinine. In proportion to the above, it ought to  
 be valued, viz:

39 quintals, at \$14 82.63, is . . . \$578 22  
 $2\frac{1}{2}$  per cent. commissions . . . . . 14 16  
\$592 68

\$7977 78 at 92, is \$7339 56, U. S. currency.

Duty, 15 per cent., is \$1100 92.

Peruvian currency \$7977 78.

On the 4th October, the collector notified Messrs. Birk-  
 head & Pearce of this decision; they, on the next day,  
 asked to be furnished with the grounds of such decision,  
 and on the 6th October, protested in writing against it  
 and asked that the case should be submitted to mer-  
 chant appraisers, as required by law. On the same  
 day, and after such request of Birkhead & Pearce, the



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appraisers wrote to Messrs. Birckhead & Pearce this letter:

Appraisers' Office, Port Baltimore, 6th Oct. 1849.

Gentlemen: In relation to your appeal, in the case of Mr. E. Bartlett's importation of bark, per barque St. Joseph, from Arica, we beg leave respectfully to notify you, that we require of this gentleman the production of all correspondence and letters and accounts in his possession relative thereto, and that he shall make a deposition before the collector of New York, that the papers he sends are all the documents he has received relating to this shipment.

Very respectfully,

M. McB.,  
H. W. E.

MESSRS. BIRCKHEAD & PEARCE.

The appraisers now state, that this letter was written to enable them to ascertain if they had committed any error or mistake in their opinion, and to enable them to review and correct the same, if erroneous.

On the 11th October, Mr. Birckhead declined to furnish the papers asked by the appraisers, in their letter of the 6th, directed the appeal to the merchant appraisers to be withdrawn, proposed to pay the additional duty, except the twenty per cent., as assessed by the appraisers, and if this were declined, instructed Birckhead & Pearce to pay the duties under protest. This is the letter:

New York, 11th October 1849.

MESSRS. BIRCKHEAD & PEARCE, Baltimore.

Dear sirs: I have yours of 9th and 10th instant. I return the debenture certificate endorsed. In looking more carefully to the requisition of your appraisers of bark, per St. Joseph, I find that I shall have to have copied and translated a mass of correspondence from January last, when it was shipped, to August; for reference is

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made to it in all my letters from Pinto & Co. and Alsop & Co., in order the more fully to explain Pinto & Co.'s mode of invoicing the bark. I shall have to present a series of documents, commencing in 1847, with their contract with the Bolivian Government, proving its actual cost to be about \$60 per quintal; all these are necessary to make out my own case, and I am unwilling to present anything less than all the documents. I do not see, however, what use they can be of, at present, to the appraisers, who have made up their valuation of the bark and made a return to the collector. I shall, therefore, defer the presentation of my documents for another tribunal, and, not to lose more time in delivering the bark to the purchasers, I wish you to inform the collector that, by my instructions, your *appeal* is withdrawn; and that you are prepared to pay, *under protest*, whatever duties may be exacted on the bark. You will then please send to me in bond what has been so directed, and deliver the remainder, as already ordered. At leisure, we can then test the question of this exaction.

The appraisers have been misinformed of the value of bark at Arica, in January last; after the large sales I made here in March and April were known, it never rose there above seventy-five to eighty cents, and if any small parcels were, at any time, smuggled to the coast and sold at that, or even a higher price, it was no guide to its value.

If a resort to the courts can be avoided, by having the valuation fixed at a rate not imposing the additional duty of twenty per cent., I shall be glad, for I have no disposition to engage in a law-suit. My immediate want, however, is the bark, and I will take my chance of having justice done, by paying all that is now asked, under protest. You can draw on me, at sight, for what funds may be required. I credit you \$111 03, for proceeds of C. Keener's draft of \$114 96.

Yours,

EDWIN BARTLETT.

Some further correspondence occurred, in all of which the appraisers insisted upon the correctness of their views, and adhered to their original opinion. Some part of the cargo by the San Josef was entered for consumption, and some for exportation. Mr. Bartlett being desirous of having the latter portion trans-shipped to New York, the collector before he would permit this to be done, insisted upon receiving all the duties thereon, including the twenty per cent. additional, which was also paid under protest. The papers called for by the appraisers in their letter of the 6th October, have not been furnished, even upon the trial.

The counsel for the plaintiff contends:

1. That the invoice valuation of the goods is deemed the true value until evidence be offered to show this valuation to be erroneous.
2. That the only method of correcting this valuation is by showing a valid appraisement according to law.
3. That the appraisement, in this case, was not a valid one.
4. That the refusal of the said plaintiff to furnish the papers called for by the appraisers did not affect his interest, but that the appraisement was erroneous.
5. That having exported some of this bark, he is entitled to the debenture upon such exportation, including the twenty per cent. he paid as a penal infliction, for an attempt to defraud the revenue laws of the United States.

The first proposition may be conceded to the plaintiff, and the question occurs, was the appraisement in this case a valid one? I do not think the secretary of the treasury had the power of fixing a chemical analysis of bark, as the only test of its dutiable value, in the manner he attempted to do, in his circular of 2d November 1848; although the contract of Pinto & Co., regards this as one method of determining the relative values of bark. The law of congress fixes the duties upon the market value at the port of exportation; and this can certainly not mean that a purchaser of this commodity shall, when he goes to buy, carry

with him a chemist to fix the exact quantity of sulphate of quinine contained in the thing purchased; but he must, and can only look at the fair market value of the article among those trading in it at the place of exportation; he can only be required to adopt the methods usually adopted by merchants in making purchases. Still, the appraisers, when they suspect a wrong done to the government, have a right to employ this means as a test, by which, with the other knowledge and information in their power, and to be procured by them, they may be enabled to arrive at a correct estimate of the true value of the article imported. Here, too, when the appraisers, having seen the two articles, are unable to form a judgment with regard to their value, they had a right to resort to this mode of ascertainment, and with this information before them, they could legitimately come to the conclusions they have reached.

But, supposing I am wrong upon this subject, the party by withdrawing his appeal, and refusing to produce the papers called for, has fixed the correctness of the appraisal. The appraisers certainly had the right to call for these papers, whether with the view of correcting their own judgment, if erroneous, or of laying them before the merchant appraisers, in the event of a prosecution of the appeal.

To refuse to produce papers, admitted to be in a party's possession, always raises the strongest inference that those papers, if produced, would operate against the person holding them. In government claims, this refusal almost amounts to evidence of fraud. The act of congress makes it, in such a case as this, conclusive proof that the papers, when produced, would be demonstrative against the pretensions of the party having them in his possession. The act makes no restriction as to the time when these papers may be called for; it does not designate who shall make the demand, and I see no reason why the demand made in this case was not properly made, and by the proper officers.

The next question then is, to what amount of debenture

*Bartlett v. Kane.*

is the party entitled in this case, upon the bark which he had exported? Here there is an increase made by the appraisers of about fifteen per cent. upon the invoice value of the cargo. The consequence of this appraisement is, that a penal exaction of twenty per cent. is imposed upon this cargo, by way of punishment for the attempt upon the revenue laws of the country. Here are two distinct things, one is an ascertainment of actual value, the other the penal consequence flowing from this ascertainment of real value; the first fixes the actual value upon which, if the party had entered the goods at the price so fixed, the duty would have been paid; it fixes the value of the goods on which the ad valorem duty is to be charged; this duty is affected by the increase or decrease of such value. But the second is quite another affair; if the appraisers fix the increased value at \$11 25, or fifty per cent. over the invoice, the same twenty per cent. can be charged; the one fluctuates according to the judgment of the appraisers, they have the right of determining what it shall be; the other is a fixed and settled per-centage established by the act of congress.

If upon this twenty per cent. assessment, a party would have a right to claim a debenture, the party offering might defeat this provision by an exportation of the articles in regard to which he had offended. I, therefore, think that the plaintiff is not entitled to any drawback upon the exportation of this bark, beyond the duty which would accrue if the goods had been entered at the price fixed by the appraisers as their true value.

Verdict for the defendant.

*Brown and Brune*, for plaintiff.

*Z. C. Lee*, District Attorney, for defendant.

Affirmed by the supreme court, in 16 Howard 263.

JOHN H. DUFFY

*vs.*

## MAYOR AND CITY COUNCIL OF BALTIMORE.

In an action against the Mayor and City Council of Baltimore, under a law of Maryland of 1835, ch. 137, making any county, incorporated town, &c., in which a riot occurs, liable for injuries to or destruction of property, occasioned thereby; with a proviso, "That no such liability shall be incurred by such county, &c., unless the authorities thereof shall have had good reason to believe that such riot, &c., was about to take place, or, having taken place, should have had notice of the same, in time to prevent said injury, &c., either by their own police, or with the aid of the citizens of such county, &c.; it being the intention of this act that no such liability shall be devolved upon such county, &c., unless the authorities thereof, having notice, have also the ability, of themselves, or with their own citizens, to prevent such injury; and provided further, that in no case shall indemnity be received, where it shall be satisfactorily proved that the civil authorities and citizens of such county, &c., when called on by the civil authorities thereof, have used all reasonable diligence, and all the powers entrusted to them, for the prevention or suppression of such riotous or unlawful assemblages:" *Held*, that in order to entitle the plaintiff to recover, it must be shown, by the evidence, that the property was destroyed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority.

It must appear also, that the city authorities had reasonable grounds for believing that such an assemblage, too strong to be resisted without their aid, had taken place, or was about to take place, and did not use reasonable diligence to suppress or prevent it.

If the property was destroyed by a tumultuous or riotous meeting, the corporation is not responsible, if diligent inquiry was made, after notice that danger was apprehended, and reasonable precautions taken by the civil authorities to guard against such a riotous and tumultuous assemblage.

Nor are they answerable, if the injury was done upon a sudden excitement, which the civil authorities had not good reason to apprehend, or, from the suddenness, had not time to prevent.

The city authorities were not bound to place officers or guards to prevent trespasses and depredations, and are not liable to pay for any destruction, unless committed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority, and which tumultuous assemblage the civil authorities had reasonable ground to believe would take place, for the purpose of destroying the property.

## Duffy v. Mayor and City Council of Baltimore.

Even if it were proved that the property destroyed was so dilapidated as to be a nuisance, and dangerous to enter, this would be no defence to such action, as it could not be lawfully abated by a riotous and tumultuous assemblage.

## Circuit Court, November Term, 1852.

This was an action on the case brought on the 27th of October 1851, by the plaintiff, a resident of New York. The grounds of action, as stated in the *narr.*, were: for that whereas the said plaintiff, heretofore, to wit, on the first day of June, in the year 1849, was lawfully possessed of certain buildings, partly built of brick and partly of frame, used in the making and manufacturing of rope, and as places of deposit, which said buildings were situate within the limits of the city of Baltimore; which said buildings were, between the first day of June and the first day of August, in the year one thousand eight hundred and forty-nine, greatly injured, and to a large amount, to wit, to the amount of ten thousand dollars, by certain rioters and tumultuous assemblages of people, in the city of Baltimore, to wit, in the district aforesaid. That the authorities of the city of Baltimore, whose duty it was to have prevented the said riotous and tumultuous assemblages of people, and to have protected the said buildings from the said injury, and who had notice of the said assemblages, in time to have prevented the said injury, and who had the ability to have prevented the said injury, did not use due reasonable and proper efforts to prevent the said assemblages, nor the happening of the said injury, but neglectingly failed to do so, and owing to the want of due care and proper attention and timely interference, on the part of the said authorities, the said injury was effected and done by the said assemblages of people. That the said city authorities had the ability to have prevented the said injury, and had notice of the said assemblages, in time to have arrested their proceedings, and to have prevented the said injury by them. And so the said plaintiff states that, by force of the act of assembly

in such case made and provided, the defendant became responsible to the said plaintiff, to a large amount, to wit, to the amount of twenty thousand dollars, and therefore, he brings suit, &c.

The suit was brought under the act of assembly of Maryland of 1835, ch. 137, which provides that any county, incorporated town or city, in which a riot occurs, shall be liable for the injury to, or destruction of property occasioned thereby; "provided, however, that no such liability shall be incurred by such county, incorporated town or city, unless the authorities thereof shall have had good reason to believe that such riot, or tumultuous assemblage, was about to take place, or having taken place, should have had notice of the same, in time to prevent said injury or destruction, either by their own police, or with the aid of the citizens of such county, town or city; it being the intention of this act, that no such liability shall be devolved on such county, town or city, unless the authorities thereof, having notice, have also the ability, of themselves, or with their own citizens, to prevent said injury: provided further, that in no case shall indemnity be received, where it shall be satisfactorily proved that the civil authorities and citizens of said county, town or city, when called on by the civil authorities thereof, have used all reasonable diligence, and all the powers entrusted to them, for the prevention or suppression of such riotous or unlawful assemblages."

The defendant made the following prayers to the court: The defendant, by its counsel, prays the court to instruct the jury, as follows:

1. That the plaintiff is not entitled to recover in this case, for any damages he may have sustained, by the injury or destruction of property spoken of by the witnesses, unless they shall find, from the evidence in the cause, that such injury or destruction was occasioned by a riotous or tumultuous assembly of people.

2. That even if they shall find that there was injury or destruction of the property of the plaintiff, and that the



Duffy v. Mayor and City Council of Baltimore.

same was occasioned by the riotous or tumultuous assemblage of people, still the plaintiff is not entitled to recover in this case, unless they shall also find, from the evidence in the cause, that the authorities of the city of Baltimore had good reason to believe, prior to such injury or destruction of property, that such riotous or tumultuous assemblage was about to take place, or had notice of its existence, in time to prevent such injury or destruction; nor then, if they shall find, from the evidence, that the civil authorities used all reasonable diligence, and exercised the powers entrusted to them for the prevention of the same, so far as it was necessary to exert such powers.

The jury was instructed as follows by—

TANEY, C. J. 1. In order to entitle the plaintiff to recover, it must be shown, by the evidence, that the property was destroyed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority.

2. It must appear also, that the city authorities had reasonable ground for believing that such an assemblage, too strong to be resisted without their aid, had taken place, or was about to take place, and did not use reasonable diligence to suppress or prevent it.

3. If it was destroyed by a tumultuous or riotous meeting, yet the corporation is not responsible, if diligent inquiry was made, after notice that danger was apprehended, and reasonable precautions taken by the civil authorities to guard against such a riotous and tumultuous assemblage.

4. Nor are they answerable, if the injury was done upon a sudden excitement, which the civil authorities had not good reason to apprehend, or, from the suddenness, had not time to prevent.

5. The city authorities were not bound to place officers or guards to prevent trespasses and depredations, and are not liable for any destruction, unless committed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority, and which tumultuous

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tuous assemblage the civil authorities had reasonable ground to believe would take place, for the purpose of destroying the property.

Verdict for the defendant.

Some evidence was offered to prove that the property was so dilapidated that it was a nuisance, and dangerous to enter. As no point was made on this evidence, it was not noticed in the opinion; but the court were clearly of opinion that, if it was a nuisance, it was no defence to this action; it could not be lawfully abated by a riotous and tumultuous assemblage.

*J. Nelson and Geo. M. Gill*, for plaintiff.

*Wm. Schley*, for defendant.

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ALEXANDER J. MARSHALL

*vs.*

BALTIMORE AND OHIO RAILROAD COMPANY.

No action will lie on a contract to pay for services rendered in obtaining the passage of a law through the legislature, by what is commonly termed *lobby members*, the same being against the policy of the law, and void.

Such a contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the legislature the fact, that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation in money for his services, in case the law was passed by the legislature, at the session referred to in the agreement.

If there was no actual agreement to practise such concealment, yet, the plaintiff will not be entitled to recover, if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as an agent for the defendant, and was to receive a compensation in money, in case the law passed.

Circuit Court, November Term, 1852.

Marshall v. Baltimore and Ohio Railroad Co.

This action was instituted the 22d of August 1850, on an alleged agreement by the defendant, to pay the plaintiff the sum of fifty thousand dollars, in six per cent. bonds of the defendant, at their par value. This sum was claimed under the said agreement, as a compensation for services rendered by the plaintiff, in procuring from the legislature of Virginia, the right of way for the defendant's railroad through that state.

By agreement all errors in pleading were waived, but the plaintiff was to furnish the court, before the day of trial, a statement of his grounds of claim, and the defendant was, in like manner, to furnish a statement of its grounds of defence.

The grounds of claim furnished by the plaintiff were as follows:—The plaintiff, in pursuance of the agreement of counsel heretofore made, specifies as the grounds of his claim:

I. 1st. The contract between the plaintiff and defendant for the payment and delivery to the plaintiff of the sum of fifty thousand dollars, in the six per cent. bonds of the defendant, at their par value, upon the terms and considerations specified, and to be found in the resolutions passed at a meeting of the committee of correspondence appointed to take charge of the general subject in regard to measures for obtaining the right of way through the states of Virginia and Pennsylvania, on the 12th of December 1846. And the further resolution of the said committee, passed on the 18th of January 1847; and in the letter of Louis McLane to the plaintiff, dated the 18th of January 1847, and in the letters of the plaintiff to the said Louis McLane, of the 9th of February 1847, and the reply of said Louis McLane thereto, of the 11th of February 1847. 2d. The performance of that contract, by plaintiff's attendance at Richmond, during the session of the legislature of Virginia of 1846-1847, in order to superintend and further any application, or other proceeding, to obtain the right of way through the state of Virginia, on behalf of the de-

defendant, and to take all prompt measures for that purpose. 3d. The happening of the contingencies whereon said compensation was payable, by the passage of the law by the legislature of Virginia of the 6th March 1847, and the acceptance of said law, by the acting under it by the defendant; by which law, upon the election of the city of Wheeling, not to pay to the company the difference of cost between the Grave creek and Fish creek routes, as specified in first section of said act, or upon the failure of said city to agree to pay such difference of cost, according to said first section, the defendant was authorized to extend its road through Virginia, to a point on the Ohio river, as low down as Fish creek.

II. The contract to be collected from all the correspondence between the plaintiff and Louis McLane, president of the Baltimore and Ohio Railroad Company, between the 12th of December 1846 and the 6th of March 1847, touching the employment and agency of the plaintiff by the defendant, in superintending and furthering the applications and proceedings, by or on behalf of the defendant, to obtain the right of way for the defendant through the state of Virginia, to the Ohio river; all which correspondence is now in the possession and knowledge of the defendant.

III. An implied contract for reasonable compensation for work and labor, care and diligence applied, and money paid, laid out and expended, by the plaintiff for the defendant, at its request, in furthering and superintending, as its agent or counsel, the proceedings before the legislature of Virginia, during the session of 1846 and 1847, by or on behalf of defendant, to obtain the right of way through Virginia, to the Ohio river. On which three distinct grounds, the plaintiff rests his claim, and insists on a verdict in his favor.

The grounds of defence stated by the defendant were as follows:—The defendant in the above cause, having received notice of the plaintiff's grounds of claim, gives the following

*Marshall v. Baltimore and Ohio Railroad Co.*

notice of defence: 1. That the agreement sought to be enforced by the plaintiff, admitting his ability to make it out by legal proof, to the extent of his pretensions, was an agreement contrary to the policy of the law, and which cannot be sustained. 2. Admitting the said agreement to be a valid one, which the courts would enforce, yet the plaintiff is not entitled to recover, because he failed to accomplish the object for which it was entered into. 3. That the law of Virginia, which was accepted by the defendant, after it had been modified by the waiver of the city of Wheeling, as mentioned in the plaintiff's notice, was not obtained through the efforts of the plaintiff, but against his strenuous opposition, and furnishes him no ground for his present claim. 4. That there was a final settlement between the plaintiff and defendant, after the passage of the Virginia law aforesaid, which concludes him in this behalf.

The resolution of the 12th December 1846, offered in evidence by the plaintiff, was as follows: -

Office of the Baltimore and Ohio Railroad Company,  
December 12, 1846.

At a meeting of the committee of correspondence appointed to take charge of the general subject in regard to measures for obtaining the right of way through the states of Virginia and Pennsylvania, there were present Messrs. Harwood, Cooke, Hoffman and O'Donnell; the president also attended. On motion, it was resolved, that the president be and he is hereby authorized, in addition to the agent heretofore employed by the committee for the same purpose, to employ and make arrangements with other responsible persons, to attend at Richmond, during the present session of the legislature, in order to superintend and further any application, or other proceeding, to obtain the right of way through the state of Virginia, on behalf

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of this company, and to take all proper measures for that purpose. That he also be authorized to agree with such agent or agents, in case a law shall be obtained from the said legislature, during the present session, authorizing the company to extend their road through that state to a point on the Ohio river, as low down the river as Fishing creek, and the stockholders of this company shall afterwards accept such law as may be obtained, and determine to act under it; or in case a law should be passed authorizing the construction of a railroad from any point on the Ohio river, above the mouth of the Little Kanawha, and below the city of Wheeling, with authority to intersect with the present Baltimore and Ohio railroad, and the stockholders of the Baltimore and Ohio Railroad Company shall determine to accept and adopt said law, or shall become the proprietors thereof, and prosecute their road according to its provisions; then, in either of the said cases, the president shall be and is authorized to pay to the agent or agents whom he may employ, in pursuance of this resolution, the sum of fifty thousand dollars, in the six per cent. bonds of this company, at their par value, and to be made payable in any time within the period of five years. Resolved, that it shall be stipulated in the agreement of said agent or agents, employed pursuant to this resolution, and as a condition thereof, that if no such law as aforesaid shall pass, or if any law that may be passed shall not be accepted or adopted, or used by the stockholders, the said agents shall not be entitled to receive any compensation whatever for the service they may render in the premises, or for any expense they may incur in obtaining such law, or otherwise.

JAMES HARWOOD,  
WILLIAM COOKE,  
SAMUEL HOFFMAN,  
COLUMBUS O'DONNELL,  
LOUIS McLANE, President.

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The above resolution was modified, on the 18th January 1847, as follows:

The committee of correspondence in regard to procuring the right of way through Virginia, met this 18th day of January 1847, at the house of Judge Harwood, the chairman; present, Mr. Harwood, Mr. Cooke and Mr. O'Donnell; the president also attended. A letter from A. J. Marshall, the company's agent at Richmond, dated the 16th instant, was submitted to the committee; on motion, it was unanimously resolved, that the right of Mr. Marshall to the compensation under the existing contract, shall attach, upon the passage of a law at the present session of the legislature, giving the right of way to Parkersburg or to Fishing creek, either to the Baltimore and Ohio Railroad Company, or to an independent company; provided this company accept the one, and adopt and act under the other, as contemplated by the contract.

JAMES HARWOOD,  
WILLIAM COOKE,  
COLUMBUS O'DONNELL.

January 19, 1847. Mr. Hoffman not having been present at the meeting yesterday, but coming to the railroad office to-day, and having read the foregoing minute, approved the same.

SAMUEL HOFFMAN.

A further modification of the resolution is contained in the following letter of the plaintiff, to Louis McLane, of the 9th of February 1847, and the reply of McLane thereto, by order of the company, dated 11th February 1847.

9th February.

Dear Sir: Sheffy reported, this morning, a route to Wheeling different from the *prescribed* route, but utterly unacceptable; you will not, in fact, be allowed to touch

the Ohio at Fish creek; but if a cheaper route can be pointed out (you not to judge of the cheapness), you are to be forced to take it. I *heard* the bill read only, and need only tell you Mr. Hunter says it is more objectionable than the present law; Mr. Green has promised to get a copy of the bill, and send it to you to-night. We anticipated, from the information given us, that the Wheeling compromise would have given you *Fish* creek as terminus; we had rallied our strength on *Fishing* creek and Hunter's compromise; we had taken ground that Fish creek would certainly defeat the road, as you could not accept it; parties were organized on this issue, and many who had voted against us before, had determined to vote with us on this issue; I think we should have carried it; many members wished to end this agitating question; it jostles and endangers every interest in the state. They would pass any reasonable law that would quiet this clamor, and at the same time would embody a fair concession to Wheeling; the extent to which a concession to Wheeling would be compatible with the acceptance of the law, was the point at issue; we insisted that a law making Fish creek the terminus would be rejected, and for this reason we could have carried Fishing creek. In this state of things, we get the proceedings of your stockholders on Monday; their resolutions respond alone to the present laws; they emphatically reject them, and have no doubt that the "prescribed route" to Wheeling will never do; at the same time, we get the "American," in which you are reported to say, you hope to get an acceptable terminus above Fishing creek. I have taken the ground, that this paper has mistaken and misrepresented you; I have no doubt, that a firm stand on your part, stating that Hunter's compromise *would* be accepted, and that *no* point higher up would be accepted, would have settled this question by a decided vote; I do not believe, under the present state of our information, you could ever get Fish creek as a terminus. The argument of Wheeling, that you will go



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to that city, if you can do no better, is greatly strengthened; they say that all you require is a change of the "prescribed" route, and an assurance that you can do no better. I fear Sheffy's bill will be pressed to-morrow; if it is, I fear it will pass; it will be impossible to resist the belief, that if Virginia is firm, and will modify the route, you will go to Wheeling. It is necessary you should speak plain and speak at once; say you cannot extend your road, unless permitted to strike the Ohio, at least as low as Fishing creek. If you will accept Fish creek, and will be positive that you will go no higher, I think you can get it; this, of course, would cut me out; but that cannot be helped. I wish to get an ultimatum from you, for I assure you, you will be confined to Wheeling otherwise. Please write to Mr. Hunter; his letter can be exhibited; take a firm stand, and we may yet retrieve the day; even if the bill gets to the senate, it may be amended.

I am, dear sir, with great respect,

Your obedient servant, &c.,

A. J. MARSHALL.

Baltimore, February 11th, 1847.

A. J. MARSHALL, Esq.

Dear Sir: Your letter of the 9th reached me at too late an hour to afford me an opportunity of consulting the committee, and without that opportunity I could not give the reply I wished. It would be difficult for me to be more explicit than I have been in regard to Fish creek, and I am sorry that you, or any one else, should require any more than the resolution unanimously adopted by the stockholders. That resolution is not confined, as your letters seem to suppose, to the *law*; it, on the contrary, does, and was intended, most explicitly, to reject *in toto* the route prescribed in the present law; and, as Fish creek could only be approached by that route, or some part of it, as certified in Mr. L.'s letter, forwarded to Mr. Hunter, that point is effectually and necessarily excluded.

I am still free to assure you that, in the opinion of the committee, the stockholders will not, under any circumstances, construct their road to Wheeling, without the privilege of a terminus at some point on the Ohio river, not higher up than Fishing creek; and it is *absolutely certain*, that the compromise proposed by Sheffy will, under no circumstances, or for any inducement whatever, be assented to; to this effect I wrote to-day to Mr. Hunter.

At the same time, that I am free to give you these assurances, the committee, after full reflection, are unwilling to assume the responsibility of preventing, by their act, the passage of a law, *if nothing better can be had*, tendering to the stockholders the option of rejecting or accepting it, which would confine their main stem to Fish creek by such route as the company might select. While the committee are persuaded that such a law would not be accepted by the stockholders, they know that there are a large number of them who believe that, if such a law should now be tendered to them, they would be thereby introduced into the state, and could hold it under consideration, if for nothing more, for the chance of getting it amended at another session, and we could not, therefore, be responsible for depriving them of that option. In this crisis, if, after the utmost exertion, nothing better can be done, if it were possible to pass Mr. Hunter's substitute, with *Fish* creek instead of *Fishing* creek, we would not undertake to prevent the passage of such a law; we would then refer the whole question to the stockholders; and I am authorized to say that, everything else failing, if such a law as is indicated pass, and the stockholders adopt it, and act under it, in the manner contemplated by the contract, your compensation shall apply to that, as to any other aspect of the case. The committee do this from the sense they entertain of the labor and exertions you have already made, and believing that the fruit of these, and your further exertions, if in a form to be acceptable to the stockholders, should inure to your benefit. They do not

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suppose this was needed to insure your continued exertions in the present crisis. It ought to be clearly understood, however, that Sheffy's compromise can, in no event, be brought within this view; and as it regards that, the committee are willing to be responsible for preventing even its tender to the stockholders; that, or anything like it, is wholly impracticable; it is worse even than the present law; it would involve the employment of Knight's route, under even greater disadvantages, and would be promptly and forever rejected.

I am, dear sir, very respectfully,

Your obedient servant,

LOUIS McLANE.

February 11th, 1847.

The committee met this day in the president's office; present, Messrs. Harwood, Hoffman, Cooke and O'Donnell. A letter from A. J. Marshall, dated the 9th inst., asking for the company's ultimatum, was submitted by the president; the same being considered, the president prepared an answer, embodying the views of the committee, which being read, was unanimously approved and adopted, and the president was ordered to send the same to Mr. Marshall. The foregoing is the letter referred to.

JAMES HARWOOD,

WILLIAM COOKE,

SAMUEL HOFFMAN,

COLUMBUS O'DONNELL.

In addition to the foregoing evidence, offered by the plaintiff, a great deal of testimony was offered by him to establish the performance of the conditions on which he was to be entitled to the compensation claimed.

The defendants, with a view to establish the illegality of the contract, as against public policy, offered in evidence a letter of the plaintiff, dated 17th November 1846, together with an inclosed document (the reading of which

latter was objected to by the plaintiff, but permitted by the court); and also two letters from Louis McLane to the plaintiff, of the 25th November and 12th December 1846, as follows:

(Letter of A. J. Marshall.)

Warrenton, November 17, 1846.

Dear Sir: In an interview with you, a few days since, I promised to submit, in writing, a plan by which I thought your much-desired "right of way," through this state, might be procured from our legislature; I herewith inclose my views on that subject, and shall respectfully await your reply. In offering myself as the agent of your company, to manage so delicate and important a trust, I am aware I lack that commanding reputation which, of itself, would point me out as best qualified for such a post; of my qualification and fitness, it is not for me to speak, and in consequence of the absolute secrecy demanded, I cannot seek testimonials of my capacity, lest I should incite inquiry. If your judgment approves my scheme, it is probable, you might get satisfactory information respecting me, by a cautious conversation with John M. Gordon, A. B. Gordon, Dr. John H. Thomas or Joseph C. Wilson, all of your city; without impropriety, I may say for myself, I have had considerable experience as a lobby-member before the legislature of Virginia; for several winters past, I have been before that body with difficult and important measures affecting the improvement of this region of country, and I think I understand the character and component material of that honorable body.

I shall have to spend six or eight weeks in Richmond, next winter, to procure important amendments to the charter of the Rappahannock Company; this will furnish reason for my presence in Richmond. There is an effort in progress to divide our county, to which we, of Warrenton, are violently hostile; this affords another reason for myself, and also for one or two other agents, to remain in

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the city of Richmond, during the winter. Colonel Walden and myself are interested in large bodies of land in Western Virginia, near which the track of your railroad will pass; this is an ostensible reason for our active interference. I live in a range of country whose representation ought to be entirely disinterested on this question of "the right of way;" notwithstanding which, I believe a plurality of our representatives have heretofore been in opposition; I know the influences that effected this, and am happy to say they will not exist next winter. Edward Broaddus, for many years a representative from Culpepper, a shrewd, intelligent man, influenced this result; Broaddus was a sort of protégé of the Richmond and James river whigs, was distinguished and promoted by them, and habitually acts with them; his place is now filled by Slaughter, a personal friend of mine; I should have little fear to carry this section of the state. The proposed plan best speaks for itself; if you think it feasible, there is no time to be lost; I hope to hear from you at your earliest leisure.

With entire respect, I am your humble servant, &c.,

A. J. MARSHALL.

I tax you with the postage, as I do not wish to be known as in correspondence.

(Document accompanying the above.)

In explanation of the plan I wish to submit, it is necessary to indulge some latitude of remark on the causes which have heretofore thwarted the just pretensions of your company. Richmond city, the Petersburg, Richmond and Potomac railroad, the James river canal and the Wheeling interest, acting in concert, have heretofore successfully combated "the right of way;" these interests fall far short of a majority in the two branches of the Virginia legislature; there is no sufficient ground, in the numeric force of this antagonist interest, to discourage the

hope of an eventual success. On an examination of their arguments, based either upon justice or expediency, I find nothing to challenge a conviction of right, or an assurance of high state policy; on the contrary, standing heretofore as a disinterested spectator of the struggle, I have condemned the emptiness and arrogance of their pretensions, and felt indignant at the success of their narrow, selfish and bigoted policy. I have observed no superiority of talent, no greater zeal or power of advocacy in the opposition, than in favor of "the right of way." The success of a cause before our legislature, having neither justice, greater expediency, stronger advocacy or greater numeric strength, is matter of just amazement to the defeated party. The elements of this success should be a subject of curious and deeply anxious investigation; for when the cause is known, a remedy or counteracting influence may be readily applied. I have no idea that any dishonorable means or appliances (further than log-rolling may be one) have been used to defeat the "right of way."

As to log-rolling, I am sorry to say, it has grown to a system in our legislature; numbers openly avow and act on it, and never conceal their bargains, except when publicity would jeopard success; no delegation are more skilful or less scrupulous at this game than our western right-of-way men, so in that regard, there is a stand off. It seems to me, the great secret of this success, is the propinquity, the presence on the ground, of your opponents. The legislature sits in their midst; they exercise a vigilant, pressing, present out-of-door influence upon the members. If the capitol were located at Weston or Clarksburg, who would question success? The Richmond interest is ever present and ever pressing; her associates of the railroad and canal are at hand, and equally active; you have no counteracting influence, and hence the success and triumph of your opponents. If I am right in these views, your claims, resting alone on justice, sectional necessity, or even high state policy, will

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be urged in vain, and must become as mere sounding clamor in the hall, unless you meet your opponents with the weapons they use so successfully against yourselves; experience shows, that something beyond what you have heretofore done, is necessary to success; and in this necessity, the plan I have to submit, has its origin.

The mass of the members in our legislature, are a thoughtless, careless, light-hearted body of men, who come there for the *per diem*, and to spend the *per diem*; for a brief space, they feel the importance and responsibility of their position; they soon, however, engage in idle pleasures, and on all questions disconnected with their immediate constituents, they become as wax, to be moulded by the most pressing influences. You need the vote of this careless mass, and if you adopt efficient means, you can obtain it; I never saw a class of men more eminently kind and social in their intercourse; through those qualities they may be approached and influenced to do anything not positively wrong, or which will not affect, prejudicially, their immediate constituency. On this question of the "right of way," a decided majority of the members can vote either way, without fear of their constituents; on this question, therefore, I consider the most active influences will ever be the most successful. Before you can succeed, in my judgment, you must reinforce the "right-of-way" members of the house, with an active, *interested*, well-organized influence ABOUT the house; you must inspire your agents with an earnest, nay, an anxious, wish for success; the rich reward of their labors must depend on success; give them nothing if they fail; endow them richly if they succeed.

This is, in brief space, the outline of my plan; reason and justice are with you; an enlarged expediency favors your claim; you have able advocates, and the best of the argument; yet with all these advantages, you have been defeated; I think I have pointed out the cause. Your opponents better understand the nature of the tribunal before

which this vast interest is brought; they act on individuals of the body out of doors, and in their chambers; your adversaries are all on the spot, and hover around the careless arbiters of the question, in vigilant and efficient activity; the contest, as now waged, is most unequal. My plan would aim to place the "right-of-way" members on an equality with their adversaries, by sending down a corps of agents, stimulated to an active partisanship, by the strong lure of a high profit.

In considering the details of the plan, I would suggest, that all practicable secrecy is desirable; it strikes me, the company should have, or know, but one agent in the matter, and let that agent select the sub-agents, from such quarters and classes, and in such numbers, as his discreet observation may dictate. I contemplate the use of no improper means or appliances in the attainment of your purpose; my scheme is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice; this is all. I require secrecy, from motives of policy alone, because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make.

In regard to the cost of all this, it must necessarily be great; the sub-agency must be extensive, and of first influence and character; all your agents must be inspired by an active zeal and determined purpose of success; this can only be accomplished for you, by offers of high contingent compensation. I will illustrate this point by a single example. Were I to become your agent, on my plan, I should like to have the services of Major Charles Hunton, of this county; Hunton, for many years, was a member of our state senate; his last year of service was as president of that body. He is an unpretending man, of good understanding and excellent address; he is a great favorite with his own party (Dem.), and universally esteemed as a gentleman of highest character; he is in moderate cir-



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cumstances, with a large family. I have no doubt, if I would bear his expenses, and secure him a contingent \$1000, he would spend the winter in Richmond, and do good service; but if I could offer him \$2000, it would become an object of great solicitude; it would pay all his debts, and smooth the path of an advancing old age; two thousand dollars would stimulate his utmost energies. If I am able to offer such inducements, I should have great confidence of success; under this plan you pay nothing, unless a law be passed which your company will accept.

Of what value would such a law be to you? Measure this value, and let your own interests, in view of the high stake you play for, fix the price. There is no use in sending a boy on a man's errand. A low offer, and that contingent, is bad judgment; high service can't be had at a low bid. I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the sub-agents, would be heavy; I know the effective service of such agents as I would employ, cannot be had, except on a heavy contingent; taking all things into view, I should not like to undertake the business, *on such terms*, unless provided with a contingent fund of at least \$50,000, secured to my order, on the passage of a law, and its acceptance by your company.

If the foregoing views are deemed worthy of consideration, I hold myself in readiness to meet any call in that behalf that may be made upon me.

Respectfully, &c.,

A. J. MARSHALL.

(Reply of Louis McLane.)

Baltimore, Nov. 25, 1846.

Dear Sir: I duly received your letter, and its inclosure, of the 17th instant, and would have acknowledged it sooner, but that I waited in the hope of being more definite in my reply. The subject is one, however, in which it is not easy to act promptly. I would be quite unwilling to act

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definitely, either to accept, or modify or reject your proposition, upon my individual responsibility, and the necessity of consultation with those whom I must, in some shape or other, consult, requires both caution and time; for the present, therefore, I propose only to acknowledge the receipt of your communication, and to assure you I will not necessarily lose time in obtaining a decision upon the subject to which it relates. It is possible, too, that I may find it necessary to ask you to repeat your visit to Baltimore. Meantime, I remain, dear sir,

Respectfully, your obedient servant,

LOUIS McLANE.

A. J. MARSHALL, Esq., Warrenton, Virginia.

(Second letter from the same.)

Baltimore, December 12, 1846.

Dear Sir: I am happy to inform you that I am now prepared to close an arrangement with you, upon the basis of your communication of the 17th of November; but as it will be necessary to make some personal explanations, and to acquaint you, more fully than I can do by letter, with our views, I must ask you to visit Baltimore, as early as may be practicable.

I am, dear sir, very respectfully,

Your obedient servant,

LOUIS McLANE.

A. J. MARSHALL, &amp;c.

The plaintiff requested the following instructions to the jury:

*Plaintiff's Prayers.*

The plaintiff, by his counsel, prays the court to instruct the jury as follows:

1. That there is nothing in the terms or provisions of the agreement, embraced in the resolutions of the committee of correspondence, dated 12th December 1846, offered in

evidence, which renders the same void, on grounds of public policy.

2. That the plaintiff is not precluded from recovering, under the agreement aforesaid, dated 12th December 1846, as modified by the agreement stated in the letter of 11th February 1847, by reason merely of the second proviso contained in the first section of the act of 6th March 1847, which has been offered in evidence, provided the jury shall find that the route, entering the ravine of the Ohio river at the mouth of Fish creek, and running so as to pass from a point in the ravine of Buffalo creek, at or near the mouth of Pile's fork, to a depot to be established by defendant on the northern side of Wheeling creek, in the city of Wheeling, upon minute estimates, made in the manner and on the basis prescribed in said act, and made after full examination and instrumental surveys of the feasible or practicable routes, appeared to be the cheapest upon which to construct, maintain and work said railroad; and provided they shall also find that the city of Wheeling did not agree to pay the difference of cost, as specified in said act, but on the contrary, renounced the right to do so, as early as the 10th of July 1847; and provided they shall also find that the said act was accepted by the stockholders of the defendant, as a part of its charter, on the 25th August 1847.

3. Upon the evidence aforesaid, the plaintiff prays the court to instruct the jury, that if they find the contract contained in the resolution of the committee of correspondence of the 12th of December 1846, and in the resolution of the committee of correspondence of the 18th of January 1847, and in the letter of Louis McLane of the 11th February 1847, aforesaid, to have been made with the plaintiff by the defendant; and also, that the act of Virginia of the 6th of March 1847 was passed at the session of the legislature of Virginia for 1846-1847, in the contract mentioned; and also, that the Baltimore and Ohio railroad, by the cheapest route to the city of Wheeling, entering the ravine of the Ohio at or north of Grave creek, was ascertained, by such

estimates as the law prescribed, to be more costly to construct, maintain and work, than said road would be by the route passing into the ravine of the Ohio at or near the mouth of Fish creek, and then to the city of Wheeling, and that the difference of said probable cost was then, in like manner, ascertained; that the defendant accepted the said law, within six months from the passage thereof; and also, that when the difference of probable cost between said two routes was ascertained according to said act, the city of Wheeling did not agree to pay to the defendant such difference of cost by the time specified in said act; and that the plaintiff did attend at Richmond during the session aforesaid, and did then and there superintend and further the applications and other proceedings to obtain the right of way through the state of Virginia, on behalf of the defendant—then the plaintiff is entitled to recover, on the special contract contained in the instrument aforesaid, the value of the contingent compensation therein stipulated.

The defendants requested the following instructions to the jury:

*Defendants' Prayers.*

1. The defendants, by their counsel, prayed the court to instruct the jury that the plaintiff was not entitled to recover, because the contract which stipulated for the payment of a contingent fee of fifty thousand dollars, in the event of obtaining from the legislature of Virginia, such a law as is described therein, was against public policy and void.

2. That if the jury shall believe that it was agreed between the parties to the said contract that the same should be kept secret, either in the terms of it, or otherwise, from the legislature of Virginia, or the public, such contract, if otherwise proper and legal, was invalid, as against public policy, and the plaintiff is not entitled to recover.

3. If the jury find that the special contract offered in evidence by the plaintiff, was proposed to be entered into by the plaintiff, from the reasons and motives, and to be executed by him, in the way suggested in his communication of the 17th November, and its inclosure, offered in evidence by the defendants (if the jury shall find that such communication was so made by plaintiff), and if they shall find that the contract aforesaid was entered into accordingly, and that said contract, or plaintiff's agency under it, was not made known to the legislature of Virginia, but in fact concealed, that then said contract was illegal and void, upon grounds of public policy.

4. The contract between the plaintiff and defendants of 12th December 1846, looked to the obtaining of a law authorizing the defendants to extend their road through the state of Virginia to a point on the Ohio river, as low down the river as Fishing creek, which law should be afterwards accepted by the defendants, with a determination to act under it, or to the incorporation of an independent company, which the defendants should determine to accept and adopt, or of whose charter they should become the proprietors, authorizing the construction of a railroad from any point on the Ohio river, between the mouth of Little Kanawha and Wheeling, and that no such law having been obtained, the plaintiff is not entitled to recover.

5. That the modified contract of the 11th of February, looked to the obtaining of the passage of Hunter's substitute, with the adoption of Fish creek instead of Fishing creek as the point of striking the Ohio; that the law which was passed on the 6th of March 1847, was a law which did not, in its terms or effect, fulfil the stipulations of the modified agreement of February 11, 1847.

6. That the acceptance of the law of March 6, 1847, by the defendants, even supposing it to be substantially the same as Hunter's substitute, did not entitle the plaintiff to recover, unless the jury should believe that such law was

obtained through his agency, under the agreement with the defendants.

7. That even if the jury should believe that the law of March 6, 1847, was obtained through the plaintiff's agency, the plaintiff is not entitled to recover, if they shall believe that it was accepted by the defendants, in consequence of the waiver by the city of Wheeling of the privileges accorded to it therein, and the stipulations contained in the agreement between the city of Wheeling and the defendants of March 6, 1847.

8. That the modified agreement of February 11, 1847, which made Hunter's substitute, modified as stated in the foregoing prayer, the standard of the law which was to be obtained, to entitle the plaintiff to the stipulated compensation, made it necessary that such law should give to the defendants the absolute right to approach the city of Wheeling by way of Fish creek; should release them from the necessity of continuing their road to Wheeling, unless the city should within one year, or the citizens of Ohio county should, in the same time, subscribe one million dollars to the stock of the defendants; should enable the defendants to open and bring into use, as they progressed, the sections of their road as they were successively finished; and should authorize the defendants to charge in proportion to distance, upon passengers and goods taken from Baltimore to Wheeling, should the road be continued to the latter place; while the law that was actually passed made it the right of the defendants to take the Fish creek route, depend upon its being the cheapest, and even then placed the defendants' right to go to Fish creek, at the option of the city of Wheeling; made it imperative that Wheeling should be the terminus of the road, without any subscription on the part of herself or others; prevented the opening of any portion of her road west of Monongahela, until the whole road could be opened to Wheeling; and obliged the defendants to charge no more for passengers and tonnage to Wheeling, than they charge to a point five miles from the river; and that before

the defendants accepted the law thus differing from that referred to in the modified agreement of February 11, 1847, the city of Wheeling waived its control of the route, leaving it to depend upon its comparative cost, agreed to subscribe five hundred thousand dollars to the stock of the defendants, and provide a depot for the defendants, at the terminus of the road; and that the adoption and acceptance of the law of March 6, 1847, thus differing from Hunter's substitute, and induced by the waiver and stipulation of Wheeling already mentioned and action under it; was not such an acceptance, adoption and action as entitled the plaintiff to recover.

9. That if the jury shall believe that the plaintiff received from the defendants the six hundred dollars given in evidence, in full discharge of his claims for compensation, under the agreement in question, then the plaintiff is not entitled to recover.

The prayers of the plaintiff and of the defendants were rejected by the court, and the following instructions were given to the jury by—

TANEY, C. J. 1. If, at the time the special contract was made, upon which this suit is brought, it was understood between the parties, that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the railroad company, dated November 17, 1846, and the paper therein inclosed; and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper, for the purpose of obtaining the passage of the law mentioned in the agreement; the contract is against the policy of the law, and no action can be maintained upon it.

2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication re-

ferred to in the preceding instruction, yet the contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the legislature of Virginia, the fact that the plaintiff was employed by the defendants, as their agent, to advocate the passage of the law they desired to obtain, and was to receive a compensation in money for his services, in case the law was passed by the legislature, at the session referred to in the agreement.

3. If there was no actual agreement to practise such concealment, yet he is not entitled to recover, if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as agent for the defendants, and was to receive a compensation in money in case the law passed.

4. If the contract was made upon a valid and legal consideration, the contingency has not happened upon which the sum of fifty thousand dollars was to be paid to the plaintiff, and the law passed by the legislature of Virginia being different, in material respects, from the one proposed to be obtained by the defendants, by the agreement of February 11, 1847, and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money.

Verdict and judgment for defendants.

*Wm. Schley* and *H. W. Davies*, for plaintiff.

*R. Johnson* and *J. H. B. Latrobe*, for defendants.

Affirmed by the supreme court, in 16 Howard 314.



WILLIAM W. T. GREENWAY

vs.

GEORGE R. GAITHER.

Where defendant contracted for the purchase of a house, and agreed to pay the purchase-money in instalments, at specified periods, but afterwards repudiated the contract, in a suit brought by the vendor for the breach; *held*, that no action could be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before the suit was instituted.

A notification by the defendant, that he would not fulfil his contract, did not authorize an immediate suit on it, because none of the payments to be made by the defendant were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which a suit at law could be immediately brought.

The court will not seal a bill of exceptions presented two years after the trial; unless satisfied that there was error in the instructions given to the jury.

Circuit Court, November Term, 1853.

This action was instituted, on the 10th March 1849, on the following contract for the purchase of a house and lot in the city of Baltimore:

I hereby agree to purchase the house and lot, No. 52 Mount Vernon Place, 37 by 160 feet, for the sum of twenty-four thousand dollars, payable in 18, 24, 30 and 36 months, interest on the whole to be paid semi-annually, the right reserved by the owner of the adjoining lot to build against the walls of said house and lot, although it may close the windows and openings on the said lot.

I, Edward M. Greenway, agree to sell the said premises on the above terms.

GEORGE R. GAITHER,  
EDWARD M. GREENWAY.

Baltimore, 9th October 1848.

The purchaser having repudiated the contract, for reasons which it is unnecessary to state, as they were not passed upon by the court, the plaintiff resold the house for a much lower sum than that agreed to be paid by the defendant, and instituted this action to recover damages for a breach of the contract.

The action was brought before the time had arrived for the payment of the first instalment of the purchase-money, under the agreement, and the cause was tried at November Term, 1851.

*Opinion of the Court.*

TANEY, C. J. 1. This action is brought for a breach of the contract set forth in the plaintiff's declaration, and the plaintiff is not entitled to recover, because, at the time the suit was brought, no one of the stipulations on the part of the defendant, contained in the contract, had been broken; and no action can be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before this suit was instituted.

2. The letters of the defendant, and those written by his authority, notifying the other party that he would not fulfil his contract, did not authorize an immediate suit upon it, because none of the payments to be made by the defendant were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which an action at law could be immediately brought.

The court was also of opinion that, as this instruction disposed of the whole case, it was unnecessary to express an opinion on the other points raised by the plaintiff, and the instructions asked for by him were, therefore, refused.

♦ Verdict for the defendant.

The plaintiff excepted to the ruling of the court, and prepared a bill of exceptions, which was not acted on at the time; two years afterwards, he applied to the court to

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seal this bill of exceptions, but the application was refused, for the reasons stated in the opinion given below. The refusal was based upon the following rule of court:

November Term, 1846.

Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court, before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing and presented to the court, during the term at which it is reserved, otherwise it shall not be sealed by the court.

November 25th, 1846.

TANEY, C. J. An application has been made to me, on the part of the plaintiff in this action, to seal a bill of exceptions, in order to carry before the supreme court, by writ of error, the instructions given to the jury by the circuit court. The cause was tried in November 1851, more than two years ago.

At the trial, an exception was reserved by the plaintiff, and among the papers now laid before me, I find one which purports to have been drawn as an exception, and upon which I see some notes of my own, which show that this paper was before me. From the lapse of time, I have forgotten the circumstances connected with the preparation of this paper, and its presentation to me; it is now found among the papers in the cause, in the clerk's office, without the signatures or seals of the judges. I cannot now say whether the refusal of the court to sign it arose from any imperfection in the statement, or from the blotched and interlined condition in which it was presented, which made it difficult to understand it; the face of the paper, as it now stands, shows that the last reason would, of itself, have been sufficient. It was, I presume, handed by me to the clerk, with directions to inform the counsel why the paper was not signed and sealed, and what was necessary to be done by them;

it is my usual custom in such cases. I have heard nothing of this exception since the term at which the case was tried.

The exception, it appears, was reserved on the 12th November 1851, and on the 29th of the December following, the counsel for the plaintiff filed a written order to the clerk, to "dismiss the appeal or writ of error." And as no exception was presented to me, after the paper I have spoken of was returned, I presume from that circumstance, and this entry on the docket, that the design to bring the question before the supreme court was abandoned. Judge Heath who sat with me on the trial died more than twelve months ago. Under such circumstances, it is very clear that, under the rule and practice of the circuit court, the plaintiff has no right to call on me to sign and seal the paper above referred to, as an exception taken at the trial. The rule of the circuit court, in relation to this subject, was before the supreme court at the last term, and fully sanctioned by it.

If, however, I had any doubt as to the correctness of the instruction which was given to the jury, I should deem it my duty to seal the exception, provided it could be done without injustice to the defendant, because it is too late now to correct an error here; and if I thought one had been committed, I should send the case to the tribunal which has the power to correct it. This is the ground upon which the plaintiff bases his application; and I have been referred to an opinion, delivered in the Queen's Bench, in the case of *Hochster v. De Latour*, reported in 20 Eng. L. & Eq. Rep. 157.

The decision of the Queen's Bench is, of course, entitled to no more weight than what it derives from the force of its reasoning and the learning which it displays in support of its opinion; and in that view of the subject, I see nothing to shake my confidence in the instructions given to the jury by the circuit court. The principle upon which that case was decided is loosely stated by Lord Campbell in the opinion delivered. In the first portion of it, the de-

cision would seem to be placed upon the character of the contract, and the necessity the plaintiff was under of preparing himself for the service, before the day when he was to enter upon its actual performance. In another part of the opinion, it would seem to be placed on the ground that, for aught that appeared on the motion in arrest of judgment, it might have been proved at the trial, that the defendant had put himself in a condition to make it impossible for him to perform his part of the engagement.

Neither of these grounds has any application to the case before me. But in the latter part of the opinion, Lord Campbell says, that a man who wrongfully renounces a contract, when he is to do an act at a future day, may be sued immediately for a breach of it, without waiting for the time stipulated for its performance. His language, in this part of his opinion, is general enough to apply to all cases where an act is to be done by the party on a future day, whether that act be to render service, or deliver goods, or pay money; and it is upon this part of the opinion that the plaintiff in this case relies to support his present application.

The language of Lord Campbell, in this part of his opinion, is perhaps broad enough to bear the construction which the plaintiff has put upon it. It is, however, but justice to him to restrict it to contracts of the character of which he was speaking; and so, I suppose, he intended it. For if he meant to say that a contract like this, by which the defendant engaged to pay a certain sum of money on certain days, would be broken, and might be sued on immediately, if the party gave notice that he would not comply with it, and intended to dispute it; if such was the doctrine he meant to announce in that opinion, it cannot be maintained either upon principle or the authority of adjudged cases. It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate

cause of action, upon which he might sue before the time of payment arrived. If, therefore, the case in the Queen's Bench had been decided previously to the trial in the circuit court, it would not have influenced the decision, and furnishes no sufficient ground for this application.

Indeed, if I entertained, upon reconsideration, some doubt as to the correctness of the decision of the circuit court, I should feel much difficulty in altering the record, by making an exception a part of it, after such a lapse of time, and when the defendant had every reason to suppose the controversy was finally closed. The counsel who tried the case for him, I understand, do not now consider themselves as authorized to appear in his behalf, and, therefore, decline interfering; and in a case where it appears that a good deal of testimony was offered, parol, as well as written, I should hardly be justified in certifying to the supreme court, a statement of the evidence, of which I have no distinct recollection, and in which I might do injustice to the defendant. The application is, therefore, refused.

*R. Johnson and Brown & Brune*, for plaintiff.

*J. Nelson, J. V. L. McMahon and J. Lloyd*, for defendant.

## ADOLPH DILL

vs.

JONATHAN H. ELLICOTT and BENJAMIN H. ELLICOTT.

The constitution of Maryland, art. 3, sect. 49, declares, "That the rate of interest in this state, shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury:" *held*, that under this provision, a contract by which a higher rate of interest than six per cent. is taken or demanded, is void, not only for the excess, but for the whole amount; and cannot be enforced in a court of justice.

A contract to do an act forbidden by law, is void, and cannot be enforced in a court of justice.

There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal.

It is true, no penalty or forfeiture is incurred by reason of the usurious contract, until the legislature shall prescribe it; but the incapacity to maintain an action upon such contract is no *forfeiture* or *penalty*, for no right of action is acquired under it, and therefore, there is nothing to forfeit.

Circuit Court, November Term, 1854.

TANEY, C. J. This action is brought by the endorsee of a bill of exchange, drawn upon the defendants, and accepted by them, for \$1000. The defendants plead, that the bill was given to secure the payment of money loaned, by the plaintiff, to the payee of the bill, upon which an interest exceeding six per cent. was reserved; and that such contract was usurious, and the plaintiff not entitled to maintain an action upon it. To this plea the plaintiff has demurred; and the question submitted to the court on these pleadings is, whether, under the constitution of Maryland, adopted in 1851, an action can be maintained upon a contract for the loan of money, where an interest of more than six per cent. is reserved or received.

The clause of the constitution is in the following words : "that the rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded ; and the legislature shall provide by law all necessary forfeitures and penalties against usury." This provision is contained in art. 3, sect. 49, under the head of "legislative department." And by the third article of the declaration of rights, all acts of assembly in force on the first Monday in November 1850, which had not expired at the adoption of the constitution, and were not altered by it, were continued in force, subject, nevertheless, to the revision of, and amendment and repeal by, the legislature of the state.

The acts of assembly, material to this question, which were passed previously to the adoption of the constitution, were those of 1704 and 1845. The first section of the act of 1704, declared that no person should exact or take above the rate of six per cent. per annum, upon the loan of any moneys, goods, or merchandise or other commodities, to be paid in money ; the second section declares, that all contracts, by which a higher rate of interest was received, should be void ; and the third section inflicted penalties for taking or receiving more than the rate of interest limited by that act. The provisions of this law were materially changed by the act of 1845 ; by that act the lender was entitled to recover the amount actually loaned with six per cent. interest upon it, although the contract was usurious, and stipulated for a higher interest, and it repealed altogether the third section of the act of 1704.

The act of 1845 was still in force when the constitution was adopted, and the point in issue between the parties, upon the demurrer, is, whether the provisions of this act are inconsistent with the clause of the constitution before recited, and therefore repealed by it. In determining this question, the wisdom or policy of usury laws, is not a subject for the consideration of the court ; that was a question for the people of Maryland when they adopted



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the constitution. It is the duty of the court to carry into effect the provisions of that instrument, according to its true intent, to be gathered from its own words; and referring to the previous legislation of the state only so far as it may contribute to illustrate the meaning of doubtful or ambiguous language, if any such be found in the constitution; and to ascertain what previous acts of assembly are still in force.

It would be difficult, we think, to raise a doubt as to the meaning of the prohibitory part of the section of which we are speaking. It declares "that the rate of interest shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded." These words are free from all ambiguity; they prohibit in plain, positive and direct terms the taking or demanding of more than six per cent. interest; and on this point it refers nothing to future legislation. The constitution itself makes the prohibition, and all future legislation must be subordinate and conformable to this provision. Whoever takes or demands more than six per cent. while this constitution is in force, does an unlawful act; an act forbidden by the constitution of the state. Nor do the words which follow qualify or restrain, in any degree, the meaning of the words above quoted; they declare that "the legislature shall provide by law all necessary forfeitures and penalties against usury." Now, usury consists in taking an interest for money above that allowed by law; the taking of more than six per cent. is therefore usury; and the words last quoted treat it as an offence, and direct the legislature to punish it with penalties and forfeitures. The words do not merely give the power to punish, they are mandatory, and make it the duty of the legislature to punish disobedience to that provision, by forfeitures and penalties. Certainly, if the taking or demanding of more than six per cent. was not intended to be absolutely prohibited by the preceding part of the section, there would be no propriety in commanding it to be punished.

The words last quoted, therefore, do not qualify or restrict the meaning of the preceding words; on the contrary, they show that the framers of the constitution, after fixing the amount of interest which a party might lawfully take or demand, proceeded to make that provision more effectual, by requiring the legislature to enforce it, and to inflict forfeitures and penalties upon any one who should thereafter take or demand an amount of interest exceeding that prescribed by the constitution.

This being the evident meaning of the language of this section, can a contract, by which a higher interest is taken or demanded, be enforced in a court of justice? It is true, the constitution does not say, in express terms, that such a contract shall be void, nor was such a provision necessary to invalidate it; for it is well settled, by a multitude of decisions, in this country and in England, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice—we do not stop at present to refer to judicial decisions to support this proposition; many cases to that effect, are cited in the opinion delivered, by the supreme court of the United States, in the *Bank of the United States v. Owens*, 2 Pet. 527; and we are not aware of any decisions, in any court, in which a contrary doctrine has been held. Indeed, in a state where the legislative, executive and judicial departments are separated, it would render all law uncertain and ineffectual, if the judicial power enforced, in whole or in part, the performance of a contract to do an act, which is altogether forbidden to be done by the constitution or laws of the state. And as the constitution has forbidden the taking or demanding of more than six per cent., no contract, made in this state, can be enforced, where a higher rate of interest is taken or demanded by the contract.

This view of the subject is fully supported by the decision of the supreme court, in the case of the *Bank of the United States v. Owens*, herein-before referred to. The charter of the bank contained a provision in the following

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words: "It (the bank) shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per cent. per annum for or upon its loans or discounts." And in an action brought by the bank upon a promissory note, the defendant pleaded that it was discounted upon an agreement to pay the bank a higher rate of interest than six per cent; to this plea the bank demurred, thus bringing the question before the court in the same mode of pleading adopted by the counsel in this case; and Mr. Sergeant, who argued the case for the bank, contended (as the counsel for the plaintiff have done here), that a mere prohibition to take more than six per cent., did not avoid a contract to take more; and that when an agreement is avoided, it is always in consequence of an express provision by law to that effect. (2 Pet. 531.) But the court held otherwise; and the language of the supreme court in deciding that question is so appropriate and directly applicable to the case before us, that we give it in the words of the court. "Some doubts have been thrown out whether, as the charter speaks only of *taking*, it can apply to a case in which the interest has been only reserved, not received; but on that point, the majority of the court are clearly of opinion that *reserving* must be implied in the word *taking*; since it cannot be permitted, by law, to stipulate for the reservation of that which it is not permitted to receive. (1 Hawk. P. C. 620.) In those instances in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence; but when the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule, that it is unlawful to contract to do that which it is unlawful to do."

After deciding this point and remarking briefly on the manner in which it came before the court, they proceed to say: "To understand the gist of the question it is necessary to observe that, although the act of incorporation

forbids the taking of greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, of the acts passed in England, and in the states, on the same subject, declare such contracts usurious and void. The question then is, whether such contracts are void in law, upon general principles? The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the hand-maid of iniquity; courts are instituted to carry into effect the laws of a country. How can they then become auxiliary to the consummation of a violation of law? To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade; there can be no civil right where there is no legal remedy; and there can be no legal remedy for that which is itself illegal."

We forbear to quote further from the language of the supreme court; and it is sufficient to say, that after having stated the principles of law in the manner set forth in the foregoing extract from the opinion, it proceeds to refer to many adjudged cases in support of the doctrine, showing that it applied to all cases where the act was prohibited by statute, although there was nothing morally wrong in the transaction; and upon this ground decided that the bank could not maintain an action on the note, as the demurrer admitted that it had been discounted upon an agreement to take more than six per cent. interest. We do not see how the case before us can be distinguished from the one decided by the supreme court; they present precisely the same question; and the established principles of law which decided the one in favor of the defendant, must decide the other in like manner.

It will be observed also, that the opinion we have quoted, points out clearly the distinction between a statute merely forbidding an act to be done, and one imposing a forfeiture or penalty for doing it; and is, in effect, an answer to that part of the argument on the part of the plaintiff

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which relied on the last words in the section of the constitution, requiring the legislature to impose forfeitures and penalties against usury. The absence of any provision inflicting a penalty (say the supreme court) does not give the party a right to maintain an action on the contract, if the law forbids the contract to be made; and the reason of the rule thus laid down is, that the contract being forbidden, the party can acquire no legal right under it, and consequently cannot maintain an action in a court of justice to enforce it. His incapacity to maintain an action upon it is no forfeiture or penalty, for he acquires no right under it, and therefore there is nothing to forfeit; the money he loans is not forfeited; for if he chooses to rely on the promise of the borrower, and the borrower repays him the money, he may lawfully keep it. It is not forfeited to the state, nor to any one else. But a court of justice cannot lend its aid to recover it, because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids. The absence of any penalty, therefore, is no argument in support of this action.

But in this case there is something more than the absence of penalties and forfeitures. It is made the duty of the legislature to inflict them; and the prohibitory clause of the constitution must be construed now in the same manner, and have the same effect, as if the legislature had performed the duty enjoined upon it. It is true, no penalty or forfeiture is incurred, until the legislature shall prescribe it; but when that duty shall have been performed (be the penalty more or less), nobody, we presume, would contend that an action could still be maintained on the contract, upon payment of the penalty. The act of no future legislature can alter the meaning of the words used in the constitution; they remain the same, and must always be construed and administered in courts of justice, according to their legal import, as they

stand in that instrument, whether future legislatures do or do not obey its mandates, and pass laws to enforce its provisions.

It follows from what we have said, that the first four sections of the act of 1845 are no longer in force. These sections made an usurious contract legal for the amount actually loaned, and authorized the lender to recover the amount, with six per cent. interest; it made it void only so far as the usurious interest was concerned; and, as a necessary consequence of this provision, it repealed expressly the third section of the act of 1704. The act of 1845 does not, therefore, prohibit an usurious contract, but sanctions and supports it, to the extent above mentioned. The constitution, on the contrary, by the prohibitory words used in it, makes the whole contract illegal, and, thereby, incapacitates the party from maintaining a suit upon it, for the money he actually loaned, or any part of it; and moreover, treats the taking or demanding more than six per cent. as an offence, and commands the legislature to provide forfeitures and penalties against it. The provisions of this act of assembly, and those contained in the constitution, are consequently inconsistent with each other, and the former is repealed.

In relation to the act of 1704, the plaintiff claims nothing under it; but inasmuch as the first section of that act, like the constitution, prohibits the taking of more than six per cent., and the second section contains an express provision, making void the contract where more is taken; the plaintiff contends that the omission of the second provision in the constitution, proves that it was not intended to make void the contract, but to leave it as provided for and legalized in the act of 1845.

But it is evident that the second section of the act of 1704, like similar provisions in the English statutes against usury, was introduced to remove any doubt which might be raised upon the words "exact or take," and to show that the prohibition was intended to apply to contracts in

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which usurious interest was reserved, to be paid at a future day, as well as to cases in which it was actually exacted and taken or received at the time of the loan. It was introduced for greater caution, and to prevent nice distinctions upon the words used. This is constantly done in acts of legislation. And the omission in the constitution of a provision of this description, contained in a previous act of assembly, would hardly justify the court in inferring that it was intended to authorize an action on a contract which the constitution itself prohibited.

In expounding an instrument so solemn and deliberate as a constitution, containing the fundamental law of the state, we are hardly at liberty to suppose that either those who framed it, or those who adopted it, intended to recognise or sanction the principle, that an action might be maintained upon a contract to do an act which the law forbade. On the contrary, a comparison between the language of the act of 1704 and the constitution tends strongly to support the construction we have given to the latter. The prohibition in the act of assembly is to "exact or take," and the second section, as we have said, was introduced for greater caution, in order to show more clearly that, while the penalties by that law were confined to the actual receiving, the prohibition extended further, and embraced contracts in which usurious interest was reserved, although payable at a future time. But the constitution does not use the prohibitory words of the first section, but provides that no higher rate shall be "taken or demanded." Now these words clearly embrace a contract by which usurious interest is to be paid at a future day, as well as contracts in which it is taken and received. It does not mean usurious interest demanded in the negotiation previous to the loan, but demanded by the contract itself, when actually made; and if so demanded, it is evidently included in the constitutional prohibition, even although the words "exact and taken" should be regarded as confined to the actual receipt.

In an instrument like this, we are bound to presume that every word was deliberately weighed and considered before it was inserted; and with the act of 1704 before them, and about to establish, under a constitutional sanction, the principle contained in its first section, it ought not to be supposed, that its words were lightly and carelessly changed, or the word "demand" substituted in the place of the word "exact," without an object. A natural and proper object would be to condense in a few words the substantial provisions spread out in the first and second sections of the act of 1704; and we think they have used words sufficient to accomplish their purpose. A comparison between the words of this act of assembly and of the constitution of 1851, tends to confirm the construction we have placed upon the latter, and which its language naturally and legally imports.

Upon the whole, the court is of opinion that the demurrer of the plaintiff to the plea of usury cannot be maintained, and judgment must be entered accordingly.

After this opinion was given, the pleadings were amended, and the court being of opinion that the facts proved by the defendants did not show that usurious interest was taken or reserved, a verdict and judgment was entered for the full amount of principal and interest due on the bill of exchange.

*J. Mason Campbell* and *St. George W. Teackle*, for plaintiff.

*G. L. Dulaney*, for defendants.



JAMES HUGHES

*vs.*

## MAYOR AND CITY COUNCIL OF BALTIMORE.

Where the mayor and city council of Baltimore were sued for damages sustained by the plaintiff, in falling into an uncovered drain, across one of the defendant's streets; *Held*, that the city authorities were the exclusive judges of the time, place and manner in which the streets should be opened, graded, paved and made highways.

That the omission of the city to grade and improve Canal street, at the point where the accident happened, and to place a rail on the side, or to cover it over, so as to make it a thoroughfare for public travel, was not, of itself, such negligence as would support the action.

Circuit Court, April Term, 1855.

This was an action on the case to recover damages sustained by the plaintiff, by falling into Harford Run, where it crossed Canal street, in the city of Baltimore.

TANEY, C. J. instructed the jury—

1. That the city authorities are the exclusive judges of the time, place and manner in which the streets shall be opened, graded and paved, and made highways.

2. That the omission of the city to grade and improve Canal street, at the point where this accident happened, and to place a rail on the side, or to cover it over, so as to make it a thoroughfare for public travel, is not, of itself, such negligence as will support this action.

3. If the accident which happened to the plaintiff was occasioned by his attempting to walk over Harford Run, where there was no bridge, or on the wall by its side, or on the rough and uneven ground between the railroad and canal, or by mistaking his way up and across said street, he is not entitled to recover.

Verdict for defendants.

*J. M. Harris* and *W. H. Travers*, for plaintiff.

*G. L. Dulaney*, for defendants.

## FRANCIS BURNAP

vs.

AUGUSTUS J. ALBERT, WILLIAM J. ALBERT and JOHN R.  
MOORE.

In an action to recover damages sustained, by an alleged unfounded and malicious suit in equity, the plaintiff must show, not only a want of probable cause, but also a malicious intent on the part of the complainants in that suit.

The want of probable cause would be evidence of malice, to be weighed by the jury in connection with the other evidence in the cause.

Where, in the progress of a cause, a writ of *ne exeat* was obtained against the defendant, and he was imprisoned thereunder, without probable cause, and through malice on the part of the counsel of the plaintiffs in that action, they will not be held responsible for such acts of their counsel, unless directed by them, nor for the motives by which they were governed.

But if such plaintiffs afterwards refused to stay the proceedings, or discharge the party from imprisonment, from the desire to obtain thereby, unjustly, any pecuniary advantage to themselves, and knew or believed, at the time of their refusal, that such proceedings and imprisonment had been procured maliciously, and without any probable cause, then they would be liable.

If, however, in refusing to interfere, they were actuated by honest motives, seeking and desiring, by legal means, to recover money which they believed to be due to them, and were guided by their counsel, whom they believed to be trustworthy, then they would not be liable.

Circuit Court, April Term, 1855.

The plaintiff, a citizen of the state of Illinois, instituted this action against the defendants, on the 1st of May 1854, to recover damages alleged to have been sustained by him, in his profession as a lawyer, by an alleged malicious and unfounded suit in chancery, brought in the state of Illinois by the defendants, against the plaintiff, as assignee in trust for the benefit of defendants and others, of certain choses in action of one Miller; and also by reason of the imprisonment of the plaintiff, during the progress of that cause, under a writ of *ne exeat*.

Burnap v. Albert.

TANEY, C. J. 1. The plaintiff is not entitled to maintain this action, unless the proceedings of which he complains were without probable cause, and also malicious on the part of the defendants; but the want of probable cause would be evidence of malice, to be weighed by the jury in connection with the other evidence in the case.

2. If the jury find that Miller, being indebted to the defendants and others, assigned his property to the plaintiff, in trust for his creditors, there was probable cause for instituting the suit mentioned in the declaration; and no action will lie against the defendants for the institution of the suit.

3. If the *ne exeat* which was afterwards obtained, and the imprisonment of the plaintiff, were procured by Marsh, or Marsh & White, without probable cause, and from malice to the plaintiff, the defendants are not responsible in this action, for these acts of their counsel, unless directed by them, nor for the motives by which they were governed.

4. But if the defendants afterwards refused to stay these proceedings, or discharge the party from imprisonment, from the desire to obtain thereby, unjustly, any pecuniary advantage to themselves, and knew or believed, at the time of their refusal, that such proceedings and imprisonment had been procured maliciously, and without any probable cause, then they are liable to this action.

5. If, however, in refusing to interfere, they were actuated by honest motives, seeking and desiring, by legal means, to recover money which they believed to be due to them, and were guided in their course by the advice of counsel, whom they believed to be trustworthy, then this action cannot be maintained.

The plaintiff being called, made default.

Judgment of nonsuit.

*Brown & Brune*, for plaintiff.

*J. M. Campbell*, for defendants.

## EX PARTE JOHN MERRYMAN.

On the 25th May 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under orders of a major-general of the United States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th May 1861, a writ of *habeas corpus* was issued by the Chief Justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May 1861; on the last-mentioned day, the writ was returned served, and the officer to whom it was directed declined to produce the petitioner, giving as his excuse the following reasons:

1. That the petitioner was arrested by the orders of the major-general commanding in Pennsylvania, upon the charge of treason, in being "publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government:"
2. That he (the officer having the petitioner in custody) was duly authorized by the President of the United States, in such cases, to suspend the writ of *habeas corpus* for the public safety:

*Held*, that the petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following:

1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of *habeas corpus*, nor authorize a military officer to do it.
2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.

Under the constitution of the United States, congress is the only power which can authorize the suspension of the privilege of the writ.

Circuit Court, April Term, 1861. Habeas Corpus.

On the 26th May 1861, the following sworn petition was presented to the Chief Justice of the United States, on behalf of John Merryman, then in confinement in Fort McHenry.

Ex parte John Merryman.

To the Hon. ROGER B. TANEY, Chief Justice of the Supreme Court of the United States.

The petition of John Merryman, of Baltimore county and state of Maryland, respectfully shows, that being at home, in his own domicil, he was, about the hour of two o'clock A. M., on the 25th day of May, A. D. 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force, deprived of his liberty, by being taken into custody, and removed from his said home to Fort McHenry, near to the city of Baltimore, and in the district aforesaid, and where your petitioner now is in close custody.

That he has been so imprisoned without any process or color of law whatsoever, and that none such is pretended by those who are thus detaining him; and that no warrant from any court, magistrate or other person having legal authority to issue the same exists to justify such arrest; but to the contrary, the same, as above stated, hath been done without color of law and in violation of the constitution and laws of the United States, of which he is a citizen. That since his arrest, he has been informed, that some order, purporting to come from one General Keim, of Pennsylvania, to this petitioner unknown, directing the arrest of the captain of some company in Baltimore county, of which company the petitioner never was and is not captain, was the pretended ground of his arrest, and is the sole ground, as he believes, on which he is now detained. That the person now so detaining him at said fort is Brigadier-General George Cadwalader, the military commander of said post, professing to act in the premises under or by color of the authority of the United States.

Your petitioner, therefore, prays that the writ of *habeas corpus* may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, judge as aforesaid, with the cause, if any, for his arrest and

Ex parte John Merryman.

detention, to the end that your petitioner be discharged and restored to liberty, and as in duty, &c.

JOHN MERRYMAN.

Fort McHenry, 25th May 1861.

United States of America,

District of Maryland, to wit:

Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the fourth circuit and district of Maryland, to take affidavits, &c., personally appeared the 25th day of May, A. D. 1861, Geo. H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God, that the matters and facts stated in the foregoing petition are true, to the best of his knowledge, information and belief; and that the said petition was signed in his presence by the petitioner, and would have been sworn to by him, said petitioner, but that he was, at the time, and still is, in close custody, and all access to him denied, except to his counsel and his brother-in-law—this deponent being one of said counsel.

Sworn to before me, the 25th day of May, A. D. 1861.

JOHN HANAN, U. S. Commissioner.

United States of America,

District of Maryland, to wit:

Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the fourth circuit and district of Maryland, to take affidavits, &c., personally appeared this 26th day of May 1861, George H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God, that on the 26th day of May, he went to Fort McHenry, in the preceding affidavit mentioned, and obtained an interview with Gen. Geo. Cadwalader, then and there in command, and deponent, one of the counsel of said John Merryman, in the foregoing petition named, and at his

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request, and declaring himself to be such counsel, requested and demanded that he might be permitted to see the written papers, and to be permitted to make copies thereof, under and by which he, the said general, detained the said Merryman in custody, and that to said demand the said Gen. Cadwalader replied, that he would neither permit the deponent, though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof.

Sworn to this 26th day of May, A. D. 1861, before me.

JOHN HANAN,

U. S. Commissioner for Maryland.

Upon this petition the Chief Justice passed the following order:

In the matter of the petition of John Merryman, for a writ of *habeas corpus*:

Ordered, this 26th day of May, A. D. 1861, that the writ of *habeas corpus* issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the circuit court of the United States in and for the district of Maryland, and that the said writ of *habeas corpus* be returnable at eleven o'clock, on Monday, the 27th of May 1861, at the circuit court room, in the Masonic Hall, in the city of Baltimore, before me, Chief Justice of the supreme court of United States.

R. B. TANEY.

In obedience to this order, Mr. Spicer issued the following writ:

District of Maryland, to wit:

The United States of America,

To General GEORGE CADWALADER, Greeting:

You are hereby commanded to be and appear before the Honorable Roger B. Taney, Chief Justice of the supreme court of the United States, at the United States court-room,

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in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said Chief Justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ.

Witness, the Honorable R. B. Taney, Chief Justice of our supreme court, &c.

THOMAS SPICER, Clerk.

Issued 26th May 1861.

The marshal made return that he had served the writ on General Cadwalader, on the same day on which it issued; and filed that return on the 27th May 1861, on which day, at eleven o'clock precisely, the Chief Justice took his seat on the bench. In a few minutes, Colonel Lee, a military officer, appeared with General Cadwalader's return to the writ, which is as follows:

Headquarters, Department of Annapolis,  
Fort McHenry, May 26, 1861.

To the Hon. ROGER B. TANEY, Chief Justice of the Supreme Court of the United States, Baltimore, Md.

Sir: The undersigned, to whom the annexed writ, of this date, signed by Thomas Spicer, clerk of the supreme court of the United States, is directed, most respectfully states, that the arrest of Mr. John Merryman, in the said writ named, was not made with his knowledge, or by his order or direction, but was made by Col. Samuel Yohe, acting under the orders of Major-General William H. Keim, both of said officers being in the military service of the United States, but not within the limits of his command.

The prisoner was brought to this post on the 20th inst.,



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by Adjutant James Wittimore and Lieut. Wm. H. Abel, by order of Col. Yohe, and is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established, that the prisoner has made often and unreserved declarations of his association with this organized force, as being in avowed hostility to the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States. He has further to inform you, that he is duly authorized by the President of the United States, in such cases, to suspend the writ of *habeas corpus*, for the public safety.

This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments.

He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the President of the United States, when you shall hear further from him.

I have the honor to be, with high respect,

Your obedient servant,

GEORGE CADWALADER,

Brevet Major-General U. S. A., Commanding.

The Chief Justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the Chief Justice said :

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General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock to-morrow. The order was then passed as follows:

Ordered, that an attachment forthwith issue against General George Cadwalader for a contempt, in refusing to produce the body of John Merryman, according to the command of the writ of *habeas corpus*, returnable and returned before me to-day, and that said attachment be returned before me at twelve o'clock to-morrow, at the room of the circuit court.

R. B. TANEY.

Monday, May 27, 1861.

The clerk issued the writ of attachment as directed.

At twelve o'clock, on the 28th May 1861, the Chief Justice again took his seat on the bench, and called for the marshal's return to the writ of attachment. It was as follows:

I hereby certify to the Honorable Roger B. Taney, Chief Justice of the supreme court of the United States, that by virtue of the within writ of attachment, to me directed, on the 27th day of May 1861, I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, "that there was no answer to my card," and therefore, could not serve the writ, as I was commanded. I was not permitted to enter the gate. So answers

WASHINGTON BONIFANT,  
U. S. Marshal for the District of Maryland.

After it was read, the Chief Justice said, that the marshal had the power to summon the *posse comitatus* to aid him in seizing and bringing before the court, the party named in the attachment, who would, when so brought in, be

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liable to punishment by fine and imprisonment; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done. The Chief Justice then proceeded as follows:

"I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds:

"1. That the president, under the constitution of the United States, *cannot suspend the privilege of the writ of habeas corpus*, nor authorize a military officer to do it.

"2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.

"It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.

"I forbore yesterday to state orally the provisions of the constitution of the United States, which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the circuit court, in the course of this week."

He concluded by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the President, in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States.

### *Opinion.*

TANEY, C. J. The application in this case for a writ of *habeas corpus* is made to me under the 14th section of the

judiciary act of 1789, which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. That act gives to the courts of the United States, as well as to each justice of the supreme court, and to every district judge, power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: the petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was at two o'clock on the morning of the 25th of May 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused: and it is not alleged in the return, that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of

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treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the president to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of *habeas corpus* at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.

When the conspiracy of which Aaron Burr was the head,

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became so formidable, and was so extensively ramified, as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills, requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.

The clause of the constitution, which authorizes the suspension of the privilege of the writ of *habeas corpus*, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives." And after prescribing the manner in which these two branches of the legislative

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department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants; and at the conclusion of this specification, a clause is inserted giving congress "the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

The power of legislation granted by this latter clause is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined, that there should be no room to doubt, where rights of such vital importance were concerned; and accordingly, this clause is immediately followed by an enumeration of certain subjects, to which the powers of legislation shall not extend. The great importance which the framers of the constitution attached to the privilege of the writ of *habeas corpus*, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true, that in the cases mentioned, congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before

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they give the government of the United States such power over the liberty of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a president of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify, in precise and plain words, the powers delegated to him, and the duties imposed upon him. The short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehension of future danger which the framers of the constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office; he is, from necessity, and the nature of his duties, the commander-in-chief of the army and navy, and of the militia, when called into actual service; but no appropriation for the support of the army can be made by congress for a longer term than two years, so that it is in the power of the succeeding house of representatives to withhold the appropriation for its support,



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and thus disband it, if, in their judgment, the president used, or designed to use it for improper purposes. And although the militia, when in actual service, is under his command, yet the appointment of the officers is reserved to the states, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the states.

So too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the senate, and cannot appoint even inferior officers, unless he is authorized by an act of congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person "shall be deprived of life, liberty or property, without due process of law"—that is, judicial process.

Even if the privilege of the writ of *habeas corpus* were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

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to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

The only power, therefore, which the president possesses, where the "life, liberty or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of *habeas corpus*, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth

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article of the amendments to the constitution, in express terms, provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence. Blackstone states it in the following words: "To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison." 1 Bl. Com. 137.

The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

The right of the subject to the benefit of the writ of *habeas corpus*, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the

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common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of *habeas corpus*, to bring his case before the King's Bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Charles II., commonly known as the great *habeas corpus* act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute of 13 William III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the *habeas corpus* act of the 31 Charles II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional

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History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone says: "To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible. But the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a *habeas corpus*, may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail or remand the prisoner. And yet early in the reign of Charles I. the court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they would not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *Petition of Right* (3 Charles I.) which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and the government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge wasailable; and when at length they agreed that it was, they however annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time, declaring that 'if they

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were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years." 3 Bl. Com. 133, 134.

It is worthy of remark, that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty, upon the *habeas corpus* issued in his behalf, excited the universal indignation of the bar.

The extract from Hallam's Constitutional History is equally impressive and equally in point. "It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no free-man could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the court of King's Bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of

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its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that the statute of Charles II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of the crown lawyers, had impaired so fundamental a privilege." 3 Hallam's Const. Hist. 19.

While the value set upon this writ in England has been so great, that the removal of the abuses which embarrassed its employment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at, that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of parliament can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Bl. Com. 136): "But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing." If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great

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question, from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the supreme court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking, in his Commentaries, of the *habeas corpus* clause in the constitution, says: "It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of *habeas corpus*, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story's Com. on the Constitution, § 1336.



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And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of *Ex parte* Bollman and Swartwout, uses this decisive language, in 4 Cranch 95: "It may be worthy of remark, that this act (speaking of the one under which I am proceeding) was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means, by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*." And again on page 101: "If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws." I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles

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only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers

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and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.<sup>1</sup>

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to

<sup>1</sup> The constitution of the United States is founded upon the principles of government set forth and maintained in the declaration of independence. In that memorable instrument the people of the several colonies declared, that one of the causes which "impelled" them "to dissolve the political bands" which connected them with the British nation, and justified them in withdrawing their allegiance from the British sovereign, was that "he (the king) had affected to render the military independent of, and superior to, the civil power."

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transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

## CASES IN EQUITY.

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DUFFY

vs.

NEALE'S ADMINISTRATOR.

Whenever money or property is lawfully recovered or received by an executor or administrator, in his representative character, he holds it as assets of the estate, and is liable in that character to the party entitled to it.

If the decedent was not liable for the money in his life-time, and his administrator, after his death, receives it in his representative character, and the receipt and acquittance of the administrator discharge the debtor, the party entitled to the money may, at his election, hold him responsible, either in his personal or representative character.

But the decedent must have held the property, or chose in action, under a contract, express or implied, with the party entitled to the money, and must have been authorized to deal with it and dispose of it in his own name.

In such cases, for the purposes of justice, the law permits the party entitled to consider the contract as having been an absolute assignment, and to treat the other party as his assignee, who took the property as his own, and agreed to become debtor to him for the proceeds realized from it; *or* to regard the contract as one of agency only, in which the property or chose in action is held by the agent, not as his own, but merely as bailee for his principal, and in which he is authorized to receive the proceeds, not as money due to himself, but as money due to the principal, and placed in his hands, subject to the order and direction of his principal.

Although, in such cases, either of the contracts above mentioned may have been the real one, yet both cannot exist at the same time, with reference to the same subject-matter, because they are inconsistent with each other.

The party entitled may elect to consider either of said contracts the true one, but he cannot proceed upon both.

If the party entitled to the money elect to proceed against the administrator in his representative capacity, and recovers a judgment, he cannot afterwards proceed, either at law or in equity, against the administrator, in his individual capacity, or against his individual estate, if he be dead.

Circuit Court. April Term, 1841. In Equity.

*Duffy v. Neale's Administrator.*

TANEY, C. J. This case has been set down for final hearing, by consent, and has been fully argued by counsel on both sides; and the court have since read the bill, answer and evidence, together with the admissions made by agreement between the parties.

The case, as presented by these proceedings, is this: Duffy, the complainant, who was an American citizen, domiciled at Buenos Ayres, shipped a cargo of hides and other property, from the port of — to Gibraltar, on board of the American schooner President Adams, commanded by Albert P. De Valengin, a citizen of the United States. The bills of lading, and other papers relating to the cargo, were made out in the name of De Valengin, as his property, in order to cover it from the Brazilian cruisers; Buenos Ayres being at that time at war with Brazil. The vessel was, however, captured and both vessel and cargo totally lost while in the possession of the captors.

After the loss, it was agreed between the complainant and De Valengin that the latter should prosecute a claim for indemnity against the Brazilian government, in his own name, claiming the cargo to have been his own property, and therefore, not liable to capture; and if he succeeded in the claim, the money, when received, to be paid over to the complainant, after deducting from it the proper charges. The claim was accordingly made by De Valengin, who died before the Brazilian government finally decided upon it. After his death, James Neale, of the city of Baltimore, obtained letters of administration on his estate, from the orphans' court of Baltimore county, and continued to prosecute the claim, until he finally succeeded. The claim upon the Brazilian government was made by Neale, as the administrator of De Valengin, and upon the ground that the cargo lost belonged to his intestate, and that he (Neale) was entitled, in his character of administrator, to receive the compensation. The indemnity was paid to him

accordingly, as the representative of De Valengin, and the amount received was brought by him into his administration account, in the orphans' court, as a part of the assets of the deceased, which had come to his hands as administrator.

In this state of the business, Duffy, the complainant, sued Neale, as administrator of De Valengin, in this court, for the money recovered as aforesaid from the Brazilian government, claiming the whole amount recovered for the cargo, as due to him, after deducting reasonable expenses and commissions, and pending this suit Neale died. After his death, administration upon his estate was granted to William Ridgeway and Mary Neale and administration *de bonis non*, on the estate of De Valengin, to Mrs. De Valengin and George G. Belt, as stated in the complainant's bill; and upon the application of the plaintiff (the present complainant) in the suit against Neale above mentioned, a summons was issued against the administrators *de bonis non* of De Valengin, in order to make them defendants in that suit. They appeared accordingly, and the suit was continued against them, until it came on for trial at November Term 1836.

At the trial, the administrators defended themselves upon the ground that they had no assets of De Valengin in their hands, and also that Neale's estate, and not De Valengin's, was liable to the plaintiff; and that the suit against Neale ought to have been continued, after his death, against his own administrators, and not against the administrators *de bonis non* of De Valengin. These grounds of defence were contested by the plaintiff, and under the instructions of the court, which are fully set out in the exceptions taken in the circuit court, and which, upon the last-mentioned point, were in his favor, the jury found that \$1403 67 were due to the plaintiff from the defendant, in that suit; but that no assets had come to their hands out of which it could be paid.

It appeared at the trial, that Neale's administrators had

not paid to the administrators *de bonis non*, the money recovered from the government of Brazil, nor any part of it; nor had assets from any other quarter come to their hands; and upon the verdict rendered as above stated, judgment was entered in the circuit court in favor of the plaintiff, which has since been affirmed in the supreme court (14 Pet. 281); so that the present complainant has, at this time, an indefeasible judgment against the administrators *de bonis non* of De Valengin, for the money received by Neale, as hereinbefore mentioned, which he has a right to enforce against any assets which may come to their hands from this transaction, and also against any assets which may come to their hands from any other quarter.

The bill in this case was filed after the judgment had been rendered in the circuit court; and in this proceeding the complainant seeks to charge the administrators of Neale with the same debt. He now places his claim upon the ground that the money received by Neale was due to the complainant directly from the Brazilian government; that the bonds given for it by the government belonged to him, and ought to have been delivered to him by Neale; and that he has a right to the proceeds of these bonds in preference to any of the creditors of Neale; and insists that the judgment at law obtained by him against the administrators *de bonis non*, is no bar to his recovery against Neale's administrators, inasmuch as the said judgment has not been satisfied.

The principles which must govern this case have been decided by the supreme court. It is now settled by the decision of that tribunal, that whenever money or property is lawfully recovered or received by an executor or administrator, in his representative character, he holds it as assets of the estate, and is liable, in that character, to the party entitled to it. In other words, if the deceased was not liable to an action for the money, in his lifetime, and his administrator, after his death, receives it in his representative character, if the receipt and acquittance of the



administrator discharged the debtor, the party entitled to the money may, at his election, hold him responsible, either in his personal or representative character.

This decision is founded upon principles of justice. Generally speaking, an executor or administrator is required to give security for the faithful application of the money which may come into his hands in that character; it was so in the present instance; and Neale could not have obtained the letters, by virtue of which he was enabled to recover this money, without giving security that whatever he received in his character as administrator, should be paid to the parties lawfully entitled; and it would be manifestly unjust, if these sureties were not responsible for money recovered by him, by virtue of the letters of administration thus obtained. He acquires his representative character, and consequently, his right to receive the money by means of the security he gives for its faithful application; and the law which confers on him the right to receive, protects, by the sureties it requires, the interests of those over whose property his letters of administration give him power.

On the other hand, it would be equally unjust, to compel the party entitled, to resort in all cases to the administrator in his representative character; for it might happen that the estate of the deceased was insolvent, and the administrator might have a personal interest of his own in increasing the fund to be divided among the creditors; and as it is his duty to know whether the money belongs to the estate of the deceased, or to a third person, he would be justly responsible in his personal character, if he carried into the estate of the deceased the money that rightfully belonged to another. The law therefore provides that the party entitled may elect to take his remedy against the administrator, either in his representative or personal character.

In all cases of the description of which we are now speaking, the intestate must have held the property, or

chose in action, in his lifetime, under a contract, express or implied, with the party entitled to the money, and must have been authorized to deal with it, and dispose of it, in his own name. And for the purposes of justice, the law permits the party entitled to consider the contract as having been an absolute assignment, and to treat the other party as his assignee, who took the property as his own, and agreed to become debtor to him for the proceeds realized from it; or to regard the contract as one of agency only, in which the property or chose in action is held by the agent, not as his own, but merely as bailee for his principal, and in which he is authorized to receive the proceeds, not as money due to himself, but as money due to the principal, and placed in his hands, subject to the order and direction of his principal.

Now, either of these contracts is consistent with the evidence, in a case where the documents and papers, as in the case before us, furnish *prima facie* proof, that the property or chose in action belongs to the person in whose possession it is found, and who is exercising over it the rights of property in his own name; and either of the said contracts is also consistent with the evidence, in cases where a factor in possession, is authorized to deal with the property of his principal in his own name, as if he were the real owner, although there should be no transfer to him, evidenced by written documents. But although in all such cases, either of the contracts above mentioned, may have been the real one, yet both of them cannot exist at the same time, with reference to the same subject-matter; because they are inconsistent with each other. They differ in substantial and important particulars, and give a right of action against the representatives of different estates.

The party entitled may, as before stated, elect to consider either of the contracts above mentioned as the true one; and may pursue his remedy against either estate; but he cannot recover against both, because he cannot be

allowed to assume the existence of two contracts, which are inconsistent with each other. Nor can he be allowed to speculate on the chances of success, and elect, in the first instance, to proceed to judgment in one aspect of the case, and afterwards resort to the other, if he finds it likely to be more profitable. He may choose between the remedies offered him against two different estates; but he cannot go against both, for the contract which enables him to recover against one, disables him from recovering against the other.

In the case now before the court, the original right of action which the complainant had, upon the contract between him and De Valengin, is merged in the judgment obtained at law. Whatever may have been the real agreement between them, the complainant cannot now go back and seek a new remedy, and try the case over again, either upon the ground that he has not recovered enough, or that the contract was different in its terms from the one which was relied upon by him at the former trial. There was but one contract between De Valengin and complainant, in relation to this claim against the Brazilian government, upon which the complainant had a right to found an action at law; and that right of action has now become a debt by judgment, and can be enforced against those only who are liable upon the judgment. The complainant could not, therefore, by a proceeding at law, charge the administrators of Neale.

His claim, upon principles of equity, would be equally untenable; for it would be evidently unjust, and would retard the settlement of both estates, and be highly injurious to the parties interested in them, if the complainant were suffered to elect one contract, and after he had pursued his remedy upon it to judgment, suddenly desist, and set up another contract, and endeavor to recover the same money from another estate, which was not liable according to the aspect first given to the contract by the complainant himself. In this case, he deliberately made

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his election, immediately after the death of Neale, and selected the estate which he desired to charge; and after having proceeded upon that election to judgment, we can see no principle of equity or justice, upon which he can now be allowed to contradict what he before contended for, and proceed upon a contract which was thereby repudiated and disavowed, on his part, in the trial at law.

The bill must, therefore, be dismissed, with costs.

V - 108-2-2  
JAMES G. WILSON

vs.

JOSEPH TURNER, JR. and JOHN C. TURNER.

On the 27th of December 1828, W. of the state of New York, obtained a patent for a machine of which he was the inventor, giving him the exclusive right to use the invention for fourteen years from the date of the patent, and no longer; on the 28th of November 1829, in consideration of the assignment to him of a rival patent, W. assigned to T. H. & T., and their assigns, all his right in said patent, for certain places, amongst others, for all the state of Maryland except the part west of the Blue Ridge, "for the term of fourteen years from the date of the patent;" and by the deed of assignment, it was agreed, "that any improvement in either of the patents mutually assigned, in the machinery, or any alteration or renewal of the same, shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts as therein designated." W., the patentee, afterwards died, and on the 16th of November 1842, his administrator obtained a renewal and extension of the patent, under the act of 4th July 1836, for the term of seven years from the expiration of the original patent, and on the 9th of August 1843, assigned to J. G. W. his interest in the patent so renewed, for all the state of Maryland east of the Blue Ridge.

On a bill filed by J. G. W. against the assignee of T. H. & T., claiming the exclusive right to use said machine, within said limits, during the term for which the patent was renewed: *held*, that the act of 4th July 1836 applied to patents granted before its passage, as well as to those afterwards issued, and consequently, embraced the patent in question.

This law clearly intended that the assignees or grantees of the patentee should share in the benefit conferred on the patentee, and have some ad-

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vantage from the extension of the patent for seven years ; for it provides, in express terms, that the benefit of the renewal shall extend to them.

The object of this clause in the act is, to preserve the contract, in the sense in which both parties understood and intended it, at the time it was made, and to secure to the purchaser the right which he intended to buy, and which the patentee must have intended to sell.

The legislature intended to guard the party who had purchased from the patentee, the right to use his invention until the expiration of his exclusive privilege, from the necessity of purchasing it again ; and when they were giving the patentee a new privilege, and one which he had no legal right to demand, they had a right to annex to it such conditions and limitations as, in their judgment, justice required.

The law meant to provide that assignees and grantees should share with the patentee the benefit of the renewal, according to the interests which they respectively acquired in the thing patented, within particular districts of country, for their own individual use.

Under the covenant contained in the deed of the 28th November 1829, each assignee, in his respective district, was to have precisely the same rights and benefits as the patentee himself had, or might afterwards obtain, so far as concerned these inventions ; and if by a subsequent act of congress, advantages were given to the patentee which he did not at that time possess, and which were not, therefore, in the contemplation of the parties, yet, according to the spirit and meaning of the covenant, the assignee had a right to stand in the place of the patentee, in his district, in respect to the new privilege as well as the old ; and it would be against equity and conscience, to allow him to use a privilege afterwards unexpectedly gained, in order to defeat his own contract, in a manner obviously inconsistent with the intention of the parties.

A case of this description is not one in which a court of equity is bound to lend its aid, even if the party had a right at law upon the technical construction of the covenant ; but the word *renewal* is broad enough to embrace not only renewals then authorized by law, but renewals that might afterwards be provided for, and this construction of the word conforms in every respect to the scope and spirit of the agreement, and carries into effect the evident intention and design of the parties, at the time they made it, and is the only construction which will do equal justice to both.

Circuit Court. April Term, 1845. In Equity.

On the 31st of August 1844, James G. Wilson, a citizen of the state of New York, filed his bill in this court, stating that on the 27th of December 1828, William Woodworth, of the state of New York, obtained a patent for a new and useful improvement in the method of planing,

tongueing, grooving and cutting into mouldings, either plank-boards or any other materials, and for reducing the same to an equal width and thickness; and also, for facing and dressing brick, and cutting, moulding or facing metallic, mineral or other substances. That said Woodworth was the true inventor and discoverer of said machine, and that it had not been in use, or described in any public work, anterior to the invention and discovery thereof by said patentee. That afterwards, Woodworth died, and on the petition of his administrator, William W. Woodworth, there was granted, on the 16th of November 1842, an extension of said patent, for the term of seven years from the 27th of December 1842, the date of the expiration of the first term. That afterwards, on the 2d day of January 1843, the said William W. Woodworth executed an instrument of disclaimer to a part of the said patented improvement, according to the act of congress in such case made and provided. That on the 9th day of August 1843, the complainant purchased from the said William W. Woodworth, administrator, all his interest in said letters patent, so renewed and extended, with the benefit of said disclaimer, for the state of Maryland east of the Blue Ridge.

That being thus the assignee of all the rights existing under the said letters patent, and the extension thereof, in and for the state of Maryland, he had reason to believe that he would be permitted to enjoy the same, and the profits thereof, without let or hindrance; but that a certain Joseph Turner, Jr., and John C. Turner had had in operation, without any right or title thereto, ever since the date of said purchase, a machine substantially the same, in principle and mode of operation, with the machine for which letters patent were granted as aforesaid. That he had given notice to the said Turners, more than once, that such conduct was in violation of his, the complainant's, rights, and if persisted in, application would have to be made to this court for redress; of all which the said Turners had been utterly regardless.

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That from the time of the original patent, the machine had been known and recognised as the invention of William Woodworth aforesaid, and the right thereto, if ever questioned at all, had in the end always been admitted and yielded to. That at the term of the circuit court of the United States for the first district, commencing on the 16th of May last past, the case of Washburn & Brown *v.* Gould was tried, which was an action brought to recover damages on account of an alleged infringement of said extended letters patent, and after an able and protracted defence, a verdict was rendered for the plaintiffs. Whereupon the complainant alleged that said patent had not only been sustained by long public concession, but also by the verdict of a jury and the judgment of a court, upon an ample trial upon the merits, and he, therefore, respectfully suggested that he had brought himself within the scope of the action of this court, by way of injunction, to protect his rights. The bill concluded with a prayer for an account and an injunction.

On the 19th of November 1844, John C. Turner filed his separate answer, stating that a patent subsequent in date to Woodworth's was granted to Uri Emmons, for a new and useful improvement in the mode of planing floor-plank, and grooving, tongueing and straightening the edges of the same, planing boards, planing and straightening square timber, &c., by machinery, at one operation, called the cylindrical planing-machine; and that, by sundry assignments, the interest in the two patents of Woodworth and Emmons, for all the state of Maryland, except that part lying west of the Blue Ridge, became vested in the respondent and his co-defendant, with the right to receive the benefit, within said limits, of any improvement in the machinery, or alteration or renewal of the patent. That by virtue thereof, at the time of the supposed renewal of the patent granted to William Woodworth, the interest therein for the state of Maryland, except that part of said state lying west of the Blue Ridge, was vested in the

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respondent and his co-defendant, jointly with John Walsh and Samuel House, to whom, to that extent, said renewal, if valid at all, accrued, by force of an agreement in one of the deeds of assignment, through which the defendants trace their title, dated the 28th November 1829; and at the time of the expiration of the said patent, on the 27th of December 1842, the said right, by assignment to them of the interest of said Walsh and House, was vested wholly in the respondent and his co-defendant.

That he knew nothing of the supposed purchase alleged in the bill to have been made by the complainant of the said William W. Woodworth, but he denied that the said William W. Woodworth had any right to convey to the complainant the rights and privileges which he claimed to derive from that purchase. That the respondent and his co-defendant were the proprietors of a machine which they employed in the business of planing, and that it was erected at a very great expense, and a very large capital was employed in carrying on the business connected therewith. That the said machine was erected before the expiration of the original patents granted to Woodworth and Emmons, by those who were possessed of the privileges conferred by both those patents for all the state of Maryland except that part lying west of the Blue Ridge. That this respondent and his co-defendant had invested their capital in the said machine and in the said business, upon the faith of the several assignments aforesaid, and believing that they would be entitled to carry on the said business and use the said machine, either, in case the said patents expired, with the public at large, or, if either or both of them were renewed, by virtue of the agreement contained in one of the said deeds, that all renewals of either of them should accrue to the benefit of the parties in interest; and he asserted that they were entitled to do so, even if the machine which they employed were substantially the same, in principle and mode of operation, with the machine for which letters patent were granted to the said Woodworth as aforesaid, which he denied.

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That he knew nothing about the disclaimer of a part of the invention of William Woodworth made by William W. Woodworth, or of the trial in the district court of Massachusetts. That he believed the patent-right above recited as granted to Uri Emmons, was identical in principle and in mode of operation with the machine now used by the respondent and his co-defendant. And further, that the patent granted to said Woodworth was in part for facing and dressing brick, and cutting mouldings on or facing metallic, mineral or other substances; and he believed that said method was not capable of being applied to metallic or mineral substances, or to any other substance than wood, and that he was advised that said patent is therefore void.

Subsequently to the filing of this answer, the parties filed in the cause the following agreement:<sup>1</sup>

It is agreed that this cause be set down for final hearing, and submitted upon bill and answer, and the following statement of facts, which it is agreed shall be taken and received as though the same had been regularly proved under a commission issued and returned in the cause, either party to have the right to appeal to the supreme court, from such decision as the circuit court may see fit to make.

*Statement of Facts.*

It is admitted that, on the 27th December 1828, William Woodworth obtained letters patent of the United States, "for a new and useful improvement in the method of planing, tongueing, grooving and cutting into mouldings, either plank, boards or any other materials, and for reducing the same to an equal width or thickness; and also for facing and dressing brick, and cutting mouldings on, or facing metallic, mineral or other substances.

<sup>1</sup> The papers referred to as parts of this agreement are omitted, as they are too lengthy to be inserted, and their substance sufficiently appears.

That subsequently, the said William Woodworth died in the city of New York, when letters of administration upon his estate were granted by the surrogate of the county of New York, unto William W. Woodworth, a son of the deceased.

That subsequently, the said administrator applied to the commissioner of patents for an extension of the said letters patent, when, on the 16th November 1842, the board to whom, under the statute in such case made and provided, the said application was referred, did adjudge and certify in writing that the letters patent aforesaid should be extended; whereupon the commissioner of patents did renew and extend the said patent for the term of seven years, from and after the expiration of the term of fourteen years, for which the said patent was originally granted.

That subsequently, on the 2d January 1843, the said William W. Woodworth, administrator, did make disclaimer of all that part of the claim which is mentioned in said letters patent, which relates to the use of the circular saws, for reducing floor-plank and other materials to a width.

That subsequently, the said William W. Woodworth, administrator as aforesaid, on the 9th August 1843, did convey to the plaintiff, James G. Wilson, all his right, title and interest in and to the said patent-right and renewal, in and for the state of Maryland (except the western part thereof, which lies west of the Blue Ridge), and no other place whatever.

It is admitted further, for the purpose of the present suit, that at the time of the filing of the bill of this cause, the defendants were using, in their planing mill, in the city of Baltimore, a machine or machines which were substantially the same, in principle and mode of operation, with that described in the specification attached to the letters patent aforesaid, without the license of the said plaintiff, or the said administrator, or any grantee or grantees under them, or either of them.

It is admitted that, on the 4th December 1828, William Woodworth, the inventor, sold and conveyed half of his interest in the said invention to James Strong.

That on the 25th April 1829, one Uri Emmons obtained a patent for a new and useful improvement in the mode of planing floor-plank, and grooving and tongueing and straightening the edge of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing-machine.

That afterwards, on the 16th May 1829, the said Emmons sold his entire interest, in the last mentioned patent, to Daniel H. Toogood, Daniel Halstead and William Tyack.

That afterwards, on the 28th November 1829, the following mutual deed of assignment was executed between Woodworth and Strong, on the one part, and Toogood, Halstead, Tyack and Emmons on the other part, by which Woodworth and Strong conveyed to Toogood, Halstead and Tyack, all their interest in the patent of December 27th 1828, in the following places, namely, in the city and county of Albany, in the state of New York; in the state of Maryland (except the western part, which lies west of the Blue Ridge); in Tennessee, Alabama, South Carolina, Georgia, the Floridas, Louisiana, Missouri and the territory west of the Mississippi; and Toogood, Halstead, Tyack and Emmons conveyed to Strong and Woodworth all their interest in Emmons' patent of 25th April 1829, for the rest and residue of the United States; by which mutual deed of assignment the parties agreed that any improvement in the machinery, or alteration or renewal of either patent, such improvement, alteration or renewal should enure to the benefit of the respective parties in interest, and might be applied and used within their respective districts.

That subsequently, on the 28th December 1829, Tyack conveyed all his interest in the two patents to William Henry Culver. That subsequently, Toogood disposed of his entire interest in the two patents to Halstead. That

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subsequently, on the 15th October 1830, Halstead assigned all his interest to William H. Culver, in whom all the interest conveyed by Woodworth & Strong under the joint deed became centred.

That subsequently, on the 4th May 1831, Culver assigned all his interest within the state of Maryland, except that part thereof lying west of the Blue Ridge, to Samuel T. Bladford. That subsequently, on the 6th September 1831, Bladford sold his interest to Richard G. Howland. That subsequently, Howland, by deeds dated on the 7th September and 3d October, respectively, conveyed to Zachariah Woollen an equal interest with himself in the two patents within the limits last aforesaid. That subsequently, on the 1st April 1836, Howland & Woollen assigned all their interest to Joseph Turner, Jr., one of the defendants, John Walsh and Samuel House. That subsequently, on the said 1st April 1836, Turner, Walsh and House conveyed two-fifths of their interest to Richard S. Howland. That subsequently, on the 1st August 1836, Howland conveyed one-half of the two-fifths held by him to Edwin P. Starr. That subsequently, Starr and Howland, on the 7th April 1838, assigned their interest to the said Turner, Walsh and House. That subsequently, by two assignments, dated on the 31st December 1839, and 10th December 1842, respectively, Walsh and House conveyed their interest to the two defendants, Joseph Turner, Jr., and John C. Turner.

It is further admitted, for the purposes of this suit, that at a trial which took place at May Term, 1846, in the circuit court of the United States for the district of Massachusetts, in the case of Washburn and others *v.* Gould, the originality of the invention by Woodworth, the patentee, became a question, and was decided in favor of the patentee.

*Reverdy Johnson and John W. B. Latrobe*, for plaintiff.

*Wm. Schley and Hugh Davey Evans*, for defendants.

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The cause having been argued before TANEY, Chief Justice, and HEATH, District Judge, the following opinion was delivered by—

TANEY, C. J. This case comes before the court upon a bill filed by James G. Wilson, against Joseph C. Turner, Jr., and John C. Turner, to restrain them from using a certain machine for planing planks and boards and other materials, which the said Turners have erected and are using in the city of Baltimore. John C. Turner, one of the defendants, has answered, and the material facts of the case as they appear upon the bill, answer and exhibits, so far as they affect this controversy, are as follows :

On the 27th of December 1828, William Woodworth, of the state of New York, obtained a patent for the machine in question, of which, as the case now stands, he appears to have been the inventor, and according to the laws of congress then in force, this patent gave him and his assignees and grantees the exclusive right to use this invention for fourteen years from the date of his patent, and no longer ; consequently, his monopoly would expire on the 27th day of December 1842.

On the 28th of November 1829, Woodworth, the patentee, and James Strong (who had, by purchase from the patentee, become entitled to one-half of the interest in the patent), in consideration of the assignment to him of a rival patent, assigned to Toogood, Halstead and Tyack, and their assigns, all their right and interest in the patent, to be sold and used in the following places : “namely, in the county of Albany, in the state of New York ; in the state of Maryland (except the western part thereof, which lies west of the Blue Ridge) ; in Tennessee, Mississippi, Alabama, South Carolina, Georgia, the Floridas, Louisiana, Missouri and the territories west of the Mississippi, and not in any other state or place within the limits of the United States, or the territories thereof ; to have and to hold the rights and privileges thereby granted, to them and their assigns, for and

during the term of fourteen years from the date of the patent:" as more fully appears by reference to the deed of assignment filed in the case. The respondents claim the right to construct and use the machine in question, by title derived from these assignees.

Woodworth, the patentee, died some time before the 9th of February 1839; on which day, letters of administration on his estate were granted to William W. Woodworth; and on the 16th of November 1842, the administrator obtained from the board of commissioners established by the act of congress of 4th July 1836, the renewal and extension of the patent, for the term of seven years from and after the expiration of the first term of fourteen years; and on the 9th of August 1843, Woodworth the administrator assigned to James G. Wilson the complainant, all his right, title and interest, in and to the said letters patent renewed and extended as aforesaid, for the state of Maryland, east of the Blue Ridge; and under this assignment, he claims the exclusive right to the use of this machine, in the part of this state above mentioned, from the date of the assignment, until the expiration of the extended term of seven years; and he insists that Toogood, Halstead and Tyack, and those claiming under them, have no right in the patent, by virtue of the assignment of 28th November 1829, at the expiration of the original term of fourteen years; and that the continued use of it by the respondents is an infringement of his right. It is upon this ground that he asks for the injunction.

At the time this patent was originally granted to Woodworth, and at the time of the assignment to Toogood, Halstead and Tyack, and the subsequent assignments, until one of the defendants became interested in the patent as assignee, there was no law authorizing, under any circumstances, the extension of a patent beyond fourteen years. At the expiration of that period of time, the exclusive rights of the patentee, and his assignees and grantees, terminated, and every person had the right to use the invention with-

out any consent or license from the inventor. But by the act of 4th July 1836, sect. 18, the patentee of an invention or discovery was authorized to obtain a renewal and extension of the patent for seven years, after the expiration of the term of fourteen years, upon proving, to the satisfaction of the board of commissioners established by that act, that he had failed to obtain from the use and sale of his invention, a reasonable remuneration for the time, ingenuity and expense bestowed upon it, and the introduction thereof into use; and that thereupon the said patent should have the same effect in law, as though it had been originally granted for the term of twenty-one years; and the same act provides, that the benefit of such renewal shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein.

This power of extension applied to patents granted before the passage of the act, as well as to those which should be afterwards issued, and consequently, embraced the patent in question.

The dispute now before us arises upon the construction of the provision in favor of assignees and grantees. It is contended, on the part of the complainant, that this provision embraces only the rights which had been acquired in the original term of fourteen years, and that assignees and grantees of the original patent can claim no benefit, from their contracts, in the extended term of seven years; that the latter enures altogether to the benefit of the patentee; gives him the exclusive right to vend, assign and use the invention during that period; and authorizes him to prevent the use of it by those who had purchased the privilege for themselves immediately, or for particular districts of country, for the original time. If this be the construction of the act of congress, the provision in favor of assignees and grantees would seem to the court to be useless and nugatory. No one would suppose that the grant of this new right annulled all contracts made under the old one, and that giving to the patentee an additional term of

seven years, would deprive purchasers of the rights which they had acquired in the original term, before the renewal was granted. If the patentee had assigned all his right, in a particular district or state, for and during the whole fourteen years, or even for a shorter period, surely that contract would continue binding upon him, notwithstanding he afterwards procured an extension of his patent, and congress could hardly have deemed it necessary to make a special provision for its protection. Certainly, according to this construction, the assignees or grantees would derive no advantage from the renewal; yet the law clearly intended that they should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years; for it provides, in express terms, that the *benefit* of the renewal shall extend to them, thus using a word which shows that it was not the intent of the legislature merely to protect interests which previously existed in assignees and grantees, but to give them a share in the benefit conferred on the patentee by the renewal of the patent.

Moreover, assignees who had purchased the title of the patentee, in particular states and territories, and individuals who had paid for the right to use the invention during the original period of the monopoly, might have suffered serious injustice by the grant of a new and further term to the patentee, unless they were embraced in it; and they would, therefore, very naturally and properly be the objects of protection. For in cases like the present, where the patent was issued, and the purchaser obtained his assignment, before the passage of the act of 1836, both parties must have understood that the exclusive right of the patentee for its whole period was transferred; and that at the expiration of the fourteen years, the assignee would have the right to use the invention without interruption, and without paying the inventor any further compensation.

The object of the clause in question is to preserve the contract, in the sense in which both parties under-



stood and intended it, at the time it was made, and to secure to the purchaser the right which he intended to buy, and supposed he had bought, and which the patentee must have intended to sell, and at the time of the contract, must have supposed he had sold. Indeed, the power of extension given by the act of 1836, would have operated most unjustly upon those who had purchased the right to use a patented machine, if it had not been accompanied by a provision for their protection; for, relying on the assurance given by the law, as it stood when the contract was made, that they had purchased for the whole period of the monopoly, and that they might lawfully continue the use of the invention after the expiration of the fourteen years, many grantees, after having obtained the assignment or grant from the patentee, had undoubtedly erected costly machinery, and encountered expenses, which they would not have incurred, if they had supposed it would be in the power of the patentee to forbid the use of his invention, after the time limited by his original patent; and if, with these expenses incurred and arrangements made for the continued use of the improvement, congress had passed the law of 1836, without this provision in favor of assignees and grantees, it would have enabled the patentee to deal with them most severely and oppressively, and to exact from them a far heavier sum for the extended term of seven years, than they would have been willing, under other circumstances, to have given for the original term of fourteen.

The legislature obviously, we think, intended to guard the party who had purchased from the patentee the right to use his invention until the expiration of his exclusive privilege, from the necessity of buying it again. And when they were giving the patentee a new privilege, and one which he had no legal right to demand, they had undoubtedly a right to annex to it such conditions and limitation as, in their judgment, justice required.

The construction which we put upon the law is con-

formable also to the previous legislation of congress upon a similar subject; for in the act passed the 21 January 1808, entitled "An act for the relief of Oliver Evans," (6 Stat. 70) whereby, in consideration of the particular circumstances of the case, a new patent was granted to him, after the expiration of the original one, there is an express provision, that no person who had before paid him for a license to use his improvements, should be obliged to renew it, or be subject to damages for not renewing it; thus granting the new patent upon the same principles, with reference to purchasers, that has been adopted and followed in the act of 1836, in cases of the extension of the term.

It is true, as was urged in the argument, that the right of extension is obviously given by the law, chiefly with a view to the advantage of the inventor, and not of his assignees or grantees; and that the patent, if extended at all, must be extended on the application of the inventor, and not his assignees; and the reason of this distinction is evident. The assignee purchases because he supposes the improvement is worth the money he pays for it, and that he can make a profit by his bargain; and if it afterwards turns out that he was mistaken, and his speculation in the patent-right proves to be a losing one, there would be no more justice in giving him a new privilege, whereby the public would be compelled to make good his losses, than there would be in the case of any other speculation, which proved to be unfortunate. But the same reason which would operate to prevent an extension to the assignee, would apply with equal force between the patentee and assignee, where the right to extend was conferred on the former. For he assigns his right to the exclusive privilege in a particular district of country, or grants it to a particular individual for his own use, for a price which he deems adequate, and is willing to take; and it would hardly be just, if the invention afterwards proved to be more valuable than he himself supposed it to be, to re-invest him on that account with the exclusive privilege for a new term, in

such a manner as would enable him to compel those who had already bought, to buy again; the more especially, when the enhanced value is often produced by the industry and expenditures of the assignee or grantee, in bringing it into more public use and more general notice.

There is one evident distinction, however, between the patentee and assignee, so far as the public is concerned. If the invention is a valuable one, the inventor confers a benefit upon the public, and yet, without any fault of his, he may fail to obtain a reasonable remuneration within the fourteen years, for the time, ingenuity and expense which he bestowed upon it; his title may be controverted, and a large portion of the time spent in expensive litigation; he may be unable to erect the improvements necessary to show its value and bring it into notice; he may have been unable to make sale of his privilege to others, upon terms which he was willing to take; and as between him and the public, therefore, which is to be ultimately benefited by the improvement, there is justice in the extension. It is to cases of this description that the act of congress applies. It proposes to do justice between the inventor and the public, while it protects assignees and grantees in the rights which they had previously acquired by contract with the patentee.

Besides, the words of the law appear to us to admit of no other interpretation than the one we have given. It declares that the *benefit of the renewal* shall extend to assignees and grantees of the thing patented, to the extent of their respective interests therein. Now, what benefit have they in the renewal, if they are excluded from the use of the thing patented during the whole of the renewed time? According to that construction of the law, so far from receiving a benefit, they would be subjected to loss. They would not even enjoy the right which they supposed they had bought, but would be compelled, at the expiration of the fourteen years, to stop the works they had constructed, at whatever loss it might occasion, unless the patentee gave them leave to proceed; yet the law, in

plain terms, declares that they are to derive an advantage from the extension, and that the benefit of the renewal shall extend to them according to their respective interests. In other words, it means to provide, that assignees and grantees shall share with the patentee the benefit of the renewal, according to the interests which they had respectively acquired in the thing patented, within particular districts of country, or for their own individual use.

The construction we have given to this law, is not only called for by its language, but conforms to the principles established by congress, in a similar case, in the act of 1839. The seventh section of that act enables the inventor to obtain a patent, although he may have previously sold the right to use or vend it to different persons, provided the sale was not more than two years before his application for a patent, and provided further, that such invention had not been abandoned to the public. But the same section also provides, that the party who purchased prior to the application for a patent, may, notwithstanding the patent, continue to use the invention and vend it to others to be used, without incurring any liability to the inventor, or any other person interested in the invention. This privilege of the purchaser is without limitation as to time, and evidently would extend to a renewed or extended patent, as well as to the original term of fourteen years.

It was decided by the supreme court, in the case of McClurg and others v. Kingsland and others (1 How. 202), that this right is not confined to the particular machine actually constructed or manufactured before the application for the patent, but that the purchaser may continue to construct, manufacture and vend the machine or composition of matter, after the patent has been obtained. Now there can be no reason for denying to a purchaser, who makes his purchase after the patent, the privileges which the law obviously intended to secure to the party who made his purchase or obtained the license of the inventor before. If the rule is just in one case, it is just in

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the other ; and if it be said that, in the last-mentioned case, the purchaser might not know that the inventor would ever apply for a patent, and had no reason to suppose that any obstacle would afterwards be interposed to the free and undisturbed use of the right he had purchased, the same must be said of the case now before the court : for the purchaser could not know that the inventor would ever apply for a renewed term ; and when he purchased the right for the whole time of the existing monopoly, he had no reason to suppose that any new obstacle would afterwards be interposed, to prevent the free, undisturbed and continued use of that right. It would make the legislation of congress in these two laws inconsistent and contradictory in its principles, and, as we think, inconsistent with justice, in cases like the one before us, if we gave to the act of 1836 the construction contended for by the complainant.

But if the law admitted of a different construction, yet the covenant of the inventor and his partner, contained in the deed of assignment hereinbefore mentioned, of 28th November 1829, would, in the judgment of the court be an insuperable bar to the relief asked for by the bill ; for it is expressly agreed between the parties to that instrument, that any improvement in either of the patents mutually assigned, in the machinery, or any alteration or renewal of the same, shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts, as therein designated. It is very true that, at the time this contract was made, the law authorizing the renewal in question had not passed, and the parties probably did not contemplate the passage of such a law. But whether the *word* renewal did or did not look to the extension of time given by the act of 1836, it is evident, upon the words of the covenant, that whatever additional value either inventor might afterwards be able to obtain for his invention, it should enure to the benefit of the assignee within the district assigned. The parties were

not only bound forever afterwards to offer no obstruction to one another in their particular districts, but to give to each other the full benefit of their respective exertions to increase the value of these inventions; and if they then only looked to a renewal to be procured by surrendering the existing patent, if it should be found to be defective, and taking out a new one, according to the act of 3 July 1832; yet it is very clear, that both parties intended that every benefit of every kind that might be obtained for the respective inventions, should belong to the assignees in their respective districts. They were, in that respect, to have a common interest in their inventions, and they have used the broadest words to accomplish that object; words which unquestionably embrace every mode by which the value of the patents could be increased.

Each assignee, in his respective district, was to have precisely the same rights and benefits as the patentee himself had, or might afterwards obtain, so far as concerns these inventions; and if, by a subsequent act of congress, advantages were given to the patentee, which he did not at that time possess, and which were not therefore in the contemplation of the parties, yet, according to the spirit and meaning of the covenant, the assignee had a right to stand in the place of the patentee, in his district, in respect to the new privilege as well as to the old; and it would be against equity and conscience to allow him to use a privilege, afterwards unexpectedly gained, in order to defeat his own contract, in a manner obviously inconsistent with the intention of the parties.

A case of this description is not one in which a court of equity is bound to lend its aid, even if the party had a right at law upon the technical construction of the covenant. But we think that the word *renewal* is broad enough to embrace not only renewals then authorized by law, but renewals that might afterwards be provided for; and that this construction of the word conforms in every respect to the scope and spirit of the agreement, and carries into

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effect the evident intention and design of the parties at the time they made it, and is the only construction which will do equal justice to both parties. Upon the whole, therefore, the court are of opinion that the complainant is not entitled to relief, and that his bill must be dismissed.

Bill dismissed with costs.

*R. Johnson and Latrobe*, for complainant.

*Schley, Stewart and Evans*, for defendants.

Affirmed by the supreme court, in 4 Howard 712.

PHILIP F. THOMAS, Trustee of J. M. LLOYD,

vs.

HENRY H. WATSON.

L. confessed judgment on two promissory notes, one of which was given upon a usurious and the other upon a gambling consideration, and afterwards became insolvent, and a trustee of his estate was appointed under the insolvent laws of Maryland: the trustee filed a bill for relief from an execution issued upon the judgment, and called on the judgment-creditor to state the true consideration of said notes:

On demurrer to the prayer for such discovery, *held*, that as the defendant had not objected to answering, on the ground that his answer might subject him to a penalty or forfeiture, and had not averred in his answer that the discovery sought for would bring him into any such danger, he could not avail himself of this defence on the argument.

Even if this defence had been made in the answer, it could not be sustained:

1. Because, as to the usury, the mere making of a usurious agreement, or taking a bond or other obligation to secure it, does not subject the lender to a penalty or forfeiture: 2. Because, as to the gaming, he was not asked to state the circumstances under which the money was won; he was required simply to state whether the consideration was a gaming debt or not, and there are many ways in which he might have won the money without subjecting himself to a penalty.

Although an affirmative answer would undoubtedly prevent the party from recovering the money, yet that is not a penalty or forfeiture, within the meaning of the law, to excuse him from answering. If the money had been paid by L. upon these two notes, the complainant might, upon a bill filed, have recovered it back.

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The principle upon which the court grants relief after a voluntary payment of money, must also entitle the party to relief after a voluntary confession of judgment.

The omission of L. to defend himself in the action at law, is no bar to the relief asked for by the complainant; these questions not having been raised in that suit, nor yet been decided in any court.

The rights and defences possessed by L. at the time of his release, are transferred to his trustee; and the complainant may now make the same defences, at law or in equity, against these claims, and against the judgment upon them, which L. could have made, if he had never become insolvent.

Although the Maryland act of 1845, ch. 352, abrogates the penalties inflicted by the act of 1704, ch. 69, in cases of usury, and permits the party to recover the sum actually loaned, with legal interest thereon, yet the contract, so far as the usurious interest is concerned, is still made void, and the policy of the former law upon the subject, in that respect, remains unaltered.

Circuit Court, April Term, 1846. In Equity.

The bill in this case was filed on the 18th day of December 1845, by the permanent trustee of J. M. Lloyd. Its object was to obtain relief, by injunction, against a judgment for \$6571 95, recovered in this court on the 18th day of April 1844, against the said Lloyd, by Henry H. Watson, a resident of the city of New York.

It stated that at the time of the confession of said judgment, Watson held two promissory notes of Lloyd, one of which amounted, principal and interest, at the date of the judgment, to about \$4328, and was given in consideration of a loan of money usuriously made by said Watson to said Lloyd; and the other of said notes was given for money lost at play, and for no other than a gambling consideration. That on the day of the rendition of the judgment, or immediately before, an agreement was entered into by the said Lloyd, with the counsel of Watson, to confess judgment for the sum of four thousand dollars and costs; that, at the time of the agreement, the promissory notes were not shown to Lloyd, nor was any calculation made of the amount due on them, the said Lloyd's agreement being to confess judgment for \$4000, and no more;



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and that he left town with the belief that judgment was so confessed, and remained under that impression till recently; that independently of said agreement, an error was made, as the defendant admits, in the rendition of the judgment, which is for \$485 59 more than purports to be due on said notes. That said Watson had caused execution to be issued for the whole amount of the judgment, and had levied upon the lands held by said Lloyd at the date of the judgment, and had advertised the same for sale. That although Lloyd himself did not avail himself of the defences which he might have made to the suit on said notes, yet the complainant, as his trustee in insolvency, and in respect of the rights of his creditors, was entitled to be relieved from the effect of said judgment, to the extent of its excess over and above the money actually loaned by said Watson to said Lloyd, and the legal interest thereon, which he, the complainant, was willing and tendered to pay to said Watson. That the complainant claimed the benefit of said defences to said judgment, which he asked to have reformed and corrected, and further prayed that the defendant in his answer might say—

1. Whether on the 18th of April 1844, he was not the holder of two promissory notes given to him by James Murray Lloyd, and if he was, what was the amount due thereon, on said day, and that he might produce the same.

2. Whether said notes were not then in the possession of his counsel, in the city of Baltimore, and did not constitute the claim upon which the judgment in the circuit court of the United States for the district of Maryland, thereinbefore referred to, was rendered?

3. Whether said judgment was not rendered in pursuance of a supposed agreement with James Murray Lloyd, the defendant therein, and whether the same was not erroneously so rendered?

4. Whether the agreement in this bill alleged to have been entered into by said Lloyd, was not, in fact, the agreement he did make?

5. What was the consideration for which said notes were given by the said Lloyd to him, the said Watson, and what the consideration of each of them?

A short copy of the judgment was exhibited with the bill. The injunction prayed for was granted on the 20th of December 1845.

On the 10th of January 1846, the defendant, Watson, filed his answer, in which he admitted the application of Lloyd for the benefit of the insolvent laws, the appointment of the complainant as his permanent trustee, the due execution of his bond, and the rendition of the judgment, as stated in the bill; but denied that any mistake was committed in the rendition of said judgment, except the one of \$485 59, mentioned in the bill, which the defendant's counsel agreed to correct, immediately upon its discovery. He stated that, at the time of the confession of said judgment, he did hold two promissory notes of said Lloyd, which were placed in his counsel's hands for collection, and were deposited in this court at the time of the rendition of the judgment on them; but he denied that any such agreement as was set forth in the bill, in regard to said confession of judgment, was ever entered into, but he was informed by his counsel, and believed, that the only agreement made in reference to said confession of judgment was an agreement to confess judgment for the whole amount of the claim represented by said notes.

To the first interrogatory he answered, that he was, at the time therein mentioned, the holder of two promissory notes of the said Lloyd, which were filed as aforesaid, and the amount due thereon was the sum stated in the judgment, less the amount aforesaid erroneously calculated as interest.

To the second interrogatory he answered, that said notes did constitute the claim upon which said judgment was rendered.

To the third interrogatory he answered, that said judgment was rendered upon the agreement stated in his

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answer, and upon no other agreement, and that there was no error in the rendition thereof, except the one stated in his answer.

To the fourth interrogatory he answered, that there never was any such agreement as stated in this interrogatory.

And the defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill contained, touching the consideration of the said notes, as being tainted either with usury or gaming, demurred thereto, for the following cause, to wit, that the said matters were triable and determinable, and available to the said Lloyd, at law, and ought not to be inquired of by this court. Wherefore, and for divers other errors and imperfections, the defendant prayed the judgment of this court, whether he should be compelled to make any further or other answer to said bill, or any of the matters and things therein contained.

To this answer the complainant excepted, the grounds assigned being—

1. That said defendant, in his answer, did not admit or deny the allegation, in the bill of the complainant contained, that the consideration of the note first therein mentioned, being the promissory note of the said James Murray Lloyd, for \$4000, was founded on an usurious consideration, but on the contrary thereof, had wholly omitted to answer the same.

2. That said defendant, in his said answer, did not admit or deny that the other promissory note referred to in the complainant's bill, being the promissory note of the said James Murray Lloyd, for \$2500, was founded on a gambling consideration, but on the contrary thereof, had wholly omitted to answer the same.

3. That the demurrer in said answer contained was insufficient, because—1st. It contained no certificate of counsel that, in his opinion, it was well founded in point of law. 2d. It was not supported by the affidavit of the de-

fendant that it was not interposed for delay. 3d. The same was unfounded in law.

The defendant afterwards supplied the affidavit to the demurrer.

The cause having been argued on the above exceptions, and on the motion to continue the injunction, before TANEY, C. J., and HEATH, District Judge, the following opinion was delivered, on the 27th August 1846, by—

TANEY, C. J. The court has taken time to examine this case with care, because the points raised in it are important, and some of them do not appear to have been fully settled by judicial decisions.

The case, as it comes before the court, is this: James Murray Lloyd, named in the proceedings, gave two promissory notes to Watson, the defendant, upon which a suit was afterwards instituted in this court, and judgment confessed by Lloyd, on the 18th of April 1844, with an agreement entered on the record that no execution should issue on the judgment, provided the amount was paid by the defendant in four equal annual instalments, counting from the day of entering the judgment, and in case of default in any instalment, execution to go for the whole sum then due. On the 15th of August 1845, Lloyd petitioned for the benefit of the insolvent laws of Maryland, and the complainant in this case was duly appointed his permanent trustee for the benefit of his creditors. Default having been made by Lloyd in the payment of the instalments hereinbefore mentioned, Watson issued an execution for the amount due on the judgment, which was levied upon lands held by Lloyd at the date of the said judgment; and thereupon, on the 18th of December 1845, the complainant, as trustee, filed this bill, and obtained from the district judge the injunction now in question.

Since the injunction issued, the answer of defendant has come in, and upon the facts stated in the answer, it is un-

necessary to examine any of the allegations in the bill, upon which the injunction was granted, except those which relate to the consideration of the two notes given by Lloyd to Watson, and upon which the judgment in question was confessed.

The bill charges that one of the notes was given upon an usurious, and the other upon a gambling, consideration; offers to pay the amount actually loaned by the defendant to Lloyd, with legal interest thereon; prays to be relieved from the residue of the judgment; and calls on the respondent to state what was the consideration for which the said notes were given. To this interrogatory the defendant has demurred, setting forth as his cause of demurrer, that the consideration of the said notes was triable and determinable in the suit at law, and ought not, therefore, to be inquired into by this court, sitting as a court of chancery. The complainant excepts to this answer as insufficient, insisting that the defendant is bound to answer the interrogatory above mentioned; and the case now comes on, upon the hearing of the exceptions, and upon the motion to continue the injunction.

Several points have been raised in the argument, which will be noticed hereafter, but the main question in the case is, upon the effect of the judgment confessed in the action at law. The complainant, as trustee under the insolvent law, stands in the place of Lloyd; and undoubtedly the latter might, in the suit against him, have availed himself of the defences stated in the bill, and might have barred the action of Watson by pleading the matters now insisted on. As he failed to do so, he would not, in ordinary cases, be permitted to insist on them in a court of equity, after having neglected to rely on them in the suit at law. But it does not follow that the same rule is to be applied where contracts are made, or securities taken, in violation of law, or contrary to declared and established policy; and of this description are all securities, by note or otherwise,

intended to secure usurious interest, or for money won at play.

In such cases the court are called upon to consider, not only the laches of the party who may have been grossly negligent in asserting his rights, but must look also to the conduct of the adverse party, and determine whether it is consistent with sound principles of jurisprudence, to protect him in the enjoyment of profits derived from securities taken in violation of the express provisions of a statute, and which the law declares shall be void. Undoubtedly, it is within the legitimate province of courts of justice, and it is their duty in the exercise of the powers confided to them, to carry into full effect the policy of the law, when that policy is sufficiently and clearly manifested. Nor can they suffer it to be defeated or embarrassed, by the application of rules which do not belong to cases of that description, but are appropriate to another class of cases, and which have been adopted in them, for the purpose of preventing unnecessary litigation, where nothing more is concerned in the issue than the individual rights of the contending parties.

The distinction between these two classes of cases, and the different rules which govern them, have been frequently recognised, where a party, by his voluntary act, has put it out of his power to use a legal defence which would have protected him from the payment of the claim. Thus, in ordinary cases of contract, if a party pays money with a full knowledge of the facts, but under the mistaken belief that he is bound by law to pay it, and afterwards discovers his error, he cannot recover it back again by any proceeding at law or in equity. Yet, in a case of usury or gaming, although he pays it not only with a knowledge of the facts, but with a knowledge of the law also, equity will relieve him and compel the adverse party to refund the money. As respects usurious interest paid to the lender, the amount paid over and above the legal interest may be recovered back again either by a suit at law or a bill in equity. (1 Fonb.

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Eq. B. 1, ch. 4, § 7, note k.) As regards a security for money lost by gaming, it was, indeed, said by Lord Talbot, that it could not be recovered, both parties being equally in fault; but that point did not arise in the case before him; it was an *obiter dictum*, when deciding upon a question of usury; and the point was decided otherwise in the case of *Rawden v. Shadwell*, Amb. 269. In the last-mentioned case, a bond had been given for money lost at play, and part of the money paid upon the bond; yet the court, upon a bill filed for that purpose, decreed that the bond should be delivered up to be cancelled, and the money repaid. Indeed, there can be no sound reason for distinguishing securities for money won at play from securities founded in usury, so as to give any advantages to the former over the latter; for they are both prohibited by law, both contrary to its settled policy; and while the laws against usury are intended to protect the necessitous against the oppression of the money-lender, and against hard and ruinous contracts forced upon them by their wants, the laws against gaming are founded upon a policy equally sound and clear, and are intended to discountenance and discourage a vice injurious to society, and often most ruinous to the individual.

If, therefore, the money had been paid by Lloyd upon these two notes, it is evident, that the complainant might, upon a bill filed, have recovered it back. And if a court of chancery would have interfered, after the money had been actually paid, is there any principle of equity which will prevent it from interposing, where the party has omitted to defend himself at law, and confessed a judgment?

There is nothing, certainly, in the technical character of a judgment that will prevent the interposition of a court of equity, for it is one of its ordinary functions to relieve against judgments at law, where a proper case is made out in equity. And if it will lend its aid to the party, after he has acknowledged the justice of the debt by the payment of the money, there can be no sufficient reason for refusing

to interpose where the party has omitted to make the defence in an action at law, and acknowledged the debt by confessing the judgment. In either case, the court acts to prevent the party from retaining an advantage which he has obtained, under a contract forbidden by law, and to uphold an established public policy, intended, in the one case, to guard against oppression, and in the other, to suppress a vice injurious to society. If the mere confession of a judgment at law would secure a party in his ill-gotten gains, the statutes passed upon these subjects would be nugatory, since they could be constantly and easily evaded by substituting a confession of judgment in the place of a note or bond, or other security. When the public policy established by the legislature is so obvious, and is so clearly founded in the principles of justice, and required by the interests of society, it would ill become a court of equity, by narrow and technical constructions, to deprive itself of the power of enforcing it.

These principles are supported by high judicial authority. So far as the question of usury is concerned, the precise point before us appears to have been decided in the court of appeals of Maryland, upon full argument, in the case of *West v. Beanes*, 3 Harr. & Johns. 568; and also in *Fanning v. Dunham*, 5 Johns. Ch. R. 142. It is true that, in the last-mentioned case, a warrant of attorney to confess the judgment was executed at the same time with the bond, and might perhaps be regarded as one of the securities taken by the lender; but the case evidently was not decided merely on that ground, but was likened by the court to the case of a borrower who had voluntarily paid the money, and thereby put it out of his power to resist, as defendant, the claim of the creditor.

As regards the money won at play, it is truly said, in 1 Story's Equity, § 303-4, that there is no difference, in principle, between usurious and gaming contracts, in this respect, as the securities in both cases are void at law, and the contracts in each case against its policy.



We concur in these doctrines, and think the omission of Lloyd to defend himself in the action at law is no bar to the relief asked for by the complainant. If the question of usury or not, or of gaming or not, had been made in the suit at law, and decided against Lloyd, undoubtedly, the complainant could not be permitted to try the same questions over again in equity, and consequently, would not be entitled to the discovery he asks for; but these questions were not raised in that suit, and have not yet been decided in any court. The question before us is, whether it is too late now to raise them, and whether the judgment confessed shuts the door against further inquiry into the consideration of the notes upon which it is admitted to have been entered. We think it does not; and that the principle upon which the court grants relief after the voluntary payment of the money, must also entitle the party to relief after a voluntary confession of judgment. In each case, the party, by his voluntary act, has deprived himself of the opportunity of defending himself in a court of law.

The act of the general assembly of Maryland, passed at December session 1845, after these contracts were made, and indeed, after the bill in this case was filed, cannot, of course, have any influence on this decision. And if it could, it would not materially affect the principles hereinbefore stated; for although this law abrogates the penalties inflicted by the act of 1704, in cases of usury, and permits the party to recover the sum actually loaned, with legal interest thereon, yet the contract, so far as the usurious interest is concerned, is still made void, and the policy of the former law upon the subject, in that respect, remains unaltered.

It has, moreover, been insisted, in the argument for the defendant, that the complainant is not entitled to the discovery, because the answer may subject the defendant to a penalty or forfeiture. Upon this point it is sufficient to say, that the defendant has not objected to answering on this ground, and does not aver, in his answer, that the dis-

covery sought, would bring him into any such danger; it cannot, therefore, we think, be relied on in the argument. But if this defence had been made in the answer, it could hardly have been sustained; for, as relates to the usury, it is admitted by the bill, that no money was received by the defendant; and the mere making of an usurious agreement, or taking a bond or other obligation to secure it, does not subject the lender to a penalty or forfeiture. Nor do we perceive how he will be brought into any such danger, by answering that part of the interrogatory which concerns the note alleged to have been given for a gaming debt. If he admits that the note was given for money won at play, it is difficult to imagine how that fact could be used to prove that he kept a faro-bank, or practised any other of those devices upon which the law inflicts a punishment; nor can we imagine how this fact could become a material link in any chain of evidence in a prosecution against him. He is not asked to state the circumstances under which the money was won; he is required simply to say whether the consideration was a gaming debt or not; and there are a multitude of ways in which he may have won the money without subjecting himself to a penalty.

In a defence of this kind, the bare statement of the defendant would hardly be sufficient, even if made in his answer; the court must be satisfied that he has some reasonable and probable grounds to apprehend danger from his answer, in case a prosecution should afterwards be instituted against him. The right to a discovery, so far as it can be maintained on principles of equity, would seem to be peculiarly necessary and appropriate in cases of this kind, where the winner most commonly takes the security in private; where no witnesses are present who know anything of the transaction; and does this, in order to deprive the loser of proof, if he should afterwards endeavor to resist the payment.

No doubt an affirmative answer in this case will pre-

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vent the party from recovering the money ; but that is not a penalty or forfeiture within the meaning of the law. The object of every bill of discovery is to obtain from the defendant the admission of some fact, which the complainant supposes will enable him to prevent the recovery of some claim which the defendant has made against him, or enable him to enforce a claim against the defendant, which he has not otherwise sufficient testimony to establish.

It has been further argued that, as Lloyd himself has not made this defence, nor united in this proceeding, his trustee under the insolvent law has no right to bring these claims into question. But we regard it as settled law, that the permanent trustee, appointed upon the release of the insolvent, becomes immediately vested with all the rights, at law or in equity, which the latter then possessed, and may enforce any right, or make any defence, which the insolvent could have maintained or enforced at the time of his insolvency. These rights are transferred to the trustee, and the complainant may now make the same defences, at law or in equity, against these claims, and against the judgment upon them, which Lloyd could have made if he had never become insolvent.

The first and second exceptions filed by the complainant must therefore be allowed, and the answer of the defendant in those respects adjudged insufficient; and the injunction heretofore granted be continued until the further order of this court. The third exception of the complainant is overruled.

*John Nelson and J. M. Buchanan*, for complainant.

*Reverdy Johnson*, for defendant.

## MARIA LOWRY

*vs.*COMMERCIAL AND FARMERS' BANK OF BALTIMORE  
and OTHERS.

Bank-stock was bequeathed to the testator's executors, and the survivor of them, to pay the dividends to one for life, with remainder over; and the executors were, by a decree in chancery, directed to hold the same in trust to pay the dividends to the devisee for life, and after her death, to divide the stock between those in remainder. The testator died rich; and several years after his death, and after all his debts were paid, one of the executors pledged the stock, which was still standing in the testator's name, to another bank to secure his individual debt; the debt being afterwards paid, the stock was transferred to T. J. & Co., one of the executors being the sole member of that firm, and was by him re-transferred into the names of himself and his co-executor, as executors. Afterwards he, signing his name as acting executor, again pledged the stock to the said bank, to secure other debts of the firm of T. J. & Co.; and a note, for which said stock was held in pledge, not being paid, in consequence of the failure and entire insolvency of the firm of T. J. & Co., the stock was sold, and the proceeds applied to its payment, leaving a balance in the hands of the bank. The last dividend on the stock, before it was sold, was received and retained by the bank; but the other dividends, which accrued whilst the stock was in pledge, were received by the said executor; those first received were paid over by him to the legatee for life, but the others were not. On a bill filed by the legatee for life, who was an alien residing in Ireland, to recover the dividends due to her, *held*:

That as the bank, to whom the stock was pledged, paid a valuable consideration for it, and had no notice, actual or constructive, of any violation of trust, upon which the transfer could be impeached in equity, it had a right to sell the stock for the payment of the note for which it was pledged, and to make the purchasers a valid title.

That purchasers of stock are not bound to look beyond the certificate, or to examine the books of the corporation, to ascertain the validity of the transfer.

But the corporation whose stock is transferred, is made the custodian of the shares, and is clothed with power to protect the rights of every one from unauthorized transfers. It is a trust placed in its hands for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper diligence and care; and is responsible for any injury sustained by its negligence or misconduct.

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As the corporation appoints the officers before whom the transfers of stock must be made, it is responsible for their acts, and must answer for their negligence or default, whenever the rights of a third person are concerned.

By the law of England, and it would seem, of Maryland also, before the act of 1843, ch. 304 (which does not apply to this case), an executor may sell or raise money on the property of the deceased, in the regular execution of his duty, and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money.

But if a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured.

In this case, the rights of stockholders and persons interested in its stock were placed by law under the guardianship and protection of the bank, so far as concerned the transfer on their books.

If these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction.

The transfer having been made by one of the executors, his character of executor, of itself, was notice that there was a *will* open to inspection upon the public records; the bank, therefore, when the transfer was proposed to be made, was bound to take notice of the will, and is chargeable to the same extent as if it had actually read it.

This stock, although specifically bequeathed, was liable to be sold to pay the testator's debts; and if the bank did not know, or had no reasonable ground for supposing, that the executor was misapplying the assets, it would not be responsible, notwithstanding its implied knowledge of the will.

The bank is equally chargeable for the neglect or omission of duty of the officer to whom it had committed the superintendence of the transfers of stock, as for the neglect or omission of its president; and such officer is also equally chargeable with implied notice of the will, and equally bound to refuse the transfer, when he saw that the executor was using this stock in violation of his trust as executor.

In the case of *Allender v. Riston*, the opinion of the court would seem to have been that, notwithstanding the act of 1798, sect. 3, an assignment by the executor, for his own debt, would be valid against the creditors of the estate, unless there were collusion with the executor; but the case was not decided on that point, nor does the opinion of the court apply to an assignment of property specifically bequeathed.

The proposition of one of two executors (the other executor not uniting in the transfer) to transfer this stock, so long after the death of a wealthy

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testator, without first obtaining an order from the court to justify him, must have satisfied any man of common experience in business, that he was grossly abusing his trust.

A bank or other corporation is bound by the same obligations, moral and legal (when the rights of third parties are concerned), that apply to the case of an individual, unless explicitly exempted by law; and if an individual, who confederates with an executor and assists him in defrauding his *cestui que trust*, is liable to the party injured, there can be no reason why a bank, which knowingly enables an executor to convert the property of the *cestui que trust* to his own private use, should not be equally responsible.

Under the act of 1798, sect. 3, an order of the orphans' court, for the sale of the stock, would protect the bank from all responsibility.

Another bank being induced, relying on the certificate of stock, to loan its money upon it, without knowledge that the stock had ever belonged to the testator, or been transferred by his executor, the stock cannot be followed in its hands, or in the hands of those to whom it afterwards sold it, and be charged with the trusts created by the will.

The complainant's claim being merely for dividends on the stock, and not for the stock itself, and this court's jurisdiction over the case being based on the alienage of the complainant, it cannot do what the facts would otherwise warrant, and decree in favor of those of the defendants who are entitled to the stock after the complainant's death; although the court would be authorized to do so, if the complainant's interests required it.

Circuit Court, April Term, 1848. In Equity.

This bill was filed on the 10th of February 1847, by Maria Lowry, an alien and subject of the Queen of the United Kingdom of Great Britain and Ireland, stating that Talbot Jones, deceased, of Baltimore, who was her brother, gave and bequeathed by his will, with other things, two hundred and eighty-two shares of stock in the Commercial and Farmers' Bank of Baltimore, to his sons Samuel Jones, Jr., and Andrew D. Jones, and the survivor of them, in trust, among other things, to pay over the dividends thereof to the complainant for the term of her natural life, and after her death to her daughter Mary (since deceased) for her life; that the testator appointed his said sons his executors, to whom letters testamentary were granted some time in the year 1834, after which, some time in the year

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1840 or 1841, a bill was filed in the chancery court of Maryland by Michael S. Norman, the guardian of Wm. B. Norman, a minor, and by said Wm. B. Norman, against the said trustees and others, and on the 6th of November 1841, by a decree passed therein, it was, amongst other things, decreed that the said trustees should hold the two hundred and eighty-two shares of stock aforesaid, in trust to pay the dividends thereof to the present complainant, Maria Lowry, for her life, and after her death, to hold ninety-four shares thereof, in trust for Emily J. Albert (the wife of Wm. J. Albert), according to the will of the testator, and transfer the remaining quantity of one hundred and eighty-eight shares to Josiah Jones, of Frederick county, and to the said Wm. B. Norman, in equal moieties.

That the said two hundred and eighty-two shares of stock continued in the name of the testator upon the books of the Commercial and Farmers' Bank, from the testator's death, in the year 1834, up to the month of May in the year 1842; on the 4th day of which month, they were transferred upon said books to the Merchants' Bank of Baltimore by the said Samuel Jones, Jr., professedly as executor aforesaid, but actually in violation of his duty as such. That on the 17th of June next following, the said Merchants' Bank transferred two hundred and eighty-two shares of the same bank stock, upon the books of the Commercial and Farmers' Bank into the name of Talbot Jones & Co., which was, at that time, the commercial style and name of the said Samuel Jones, Jr. That said Talbot Jones & Co., on the 20th day of the same month, transferred two hundred and eighty-two shares of the stock of said Commercial and Farmers' Bank, upon the books of said bank, into the names of Samuel Jones, Jr., and Andrew D. Jones, executors of Talbot Jones, deceased; and that said Samuel Jones, Jr., on the 17th of August next ensuing, describing himself as the acting executor of Talbot Jones, deceased, and professing to act for both executors of said deceased, transferred, by his sole act, to the

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Merchants' Bank aforesaid, the said two hundred and eighty-two shares of Commercial and Farmers' bank stock, which it has held ever since, receiving from time to time the dividends thereon, when declared and paid by said Commercial and Farmers' Bank.

That the shares of stock so as aforesaid transferred to the said Merchants' Bank, were by it received from the said Samuel Jones, Jr., and that it dealt alone with him in both transactions, and took his individual title only to said shares of stock, and that the complainant knew of no consideration given by the said Merchants' Bank, for either of said transfers, to the said Samuel Jones, Jr., and therefore charged that there was none, or if there were any, she charged that there were other securities lodged with it by said Jones, abundantly sufficient to make it safe without resorting to said shares of stock; and that she gave notice of her claim upon said shares of stock, and of the real title thereto, to the said Merchants' Bank of Baltimore, and charged that Daniel Sprigg, the cashier of the said bank, was aware, at the time of both of said transfers, of the said decree in chancery, and of the identity of the stock there mentioned with that transferred to the said Merchants' Bank; and that at the time of said transfers, the president and one or more of the directors and officers of the Commercial and Farmers' Bank knew the contents of the will of the said Talbot Jones, and the existence of the decree aforesaid; and that said Talbot Jones had been dead many years, and that any debts he might have left behind him had been settled long before the year 1842; and that the co-executor and co-trustee of said Samuel Jones, Jr., was a resident of Baltimore and doing business therein.

That the dividend declared by the said Commercial and Farmers' Bank, payable in November 1845, upon said two hundred and eighty-two shares, was \$197 40, and that payable in the year following was \$394 80, no part of which had been received by the complainant; that she first heard of the transfer of said shares in October 1846;



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that Andrew P. Jones died in August 1846; that Samuel Jones, Jr., was insolvent; and that William B. Norman was under age, and Daniel Sprigg was his guardian.

That the said transfers of the 4th of May and 17th of August 1842, were made by the president and directors of the Commercial and Farmers' Bank in violation of a by-law of said bank upon the subject of transfers by executors and others holding stock in a fiduciary character, and with notice of said shares being held only in a fiduciary character by said Samuel Jones, Jr., and Andrew D. Jones, and of their being used for his own benefit by said Samuel. That both said transfers were made and allowed without any authority in law on the part of said Samuel, and that they were void, and transferred no title to said shares as against the complainant; but that neither the Commercial and Farmers' Bank, nor the Merchants' Bank, would admit the invalidity of said transfers, nor the complainant's right to said shares, and to the dividends thereon.

The bill propounded certain interrogatories to the defendants, and prayed that it might be decreed that said transfers were null and void; that the shares transferred were still the property of the said Samuel Jones, Jr., as surviving trustee under the decree therein mentioned, and under the will of said Talbot Jones, deceased, and that it should be so entered upon the books of the Commercial and Farmers' Bank; and that there should be paid to the complainant the dividends declared on said shares in the month of November 1845, and in the year 1846.

The answer of Daniel Sprigg, cashier of the Merchants' Bank, admitted that he had heard that Talbot Jones died in 1834, and left a will of which Samuel Jones, Jr., and Andrew D. Jones were executors, and that he was told by William J. Albert, at a meeting of the creditors of Talbot Jones & Co. in the autumn of 1846, that two hundred and eighty-two shares of stock of the Commercial and Farmers' Bank were left by said Jones as a part of his estate; and that he was subsequently, and after the 4th of December

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1846, informed by said Albert of the decree which he supposed was the decree mentioned in the bill; but that he had never heard previously to said conversations with said Albert, either of said trusts, or of said decree. That he was the cashier of the Merchants' Bank on the 4th of May and 17th of August 1842, and still was, but that he was not, at either of said periods, aware of the existence or of the contents of the decree referred to in said bill; that the first information he ever obtained of said decree, so far as he recollected, as already stated, was some time after the 4th of December 1846, when he was informed by Mr. Wm. J. Albert of the existence of a decree, and of its contents, which decree he supposed was the one referred to in said bill. That Andrew D. Jones was a partner in the firm of Jones, Burneston & Co., and did business in Baltimore to the time of his death, in 1846; that Samuel Jones, Jr., was insolvent, and that respondent was the guardian of William B. Norman.

The answer of the Merchants' Bank stated that Daniel Sprigg was its cashier on the 4th of May and 17th of August 1842, and still was; that the respondent had no knowledge or information whether or not, on or before either of said days, said Sprigg was or was not aware of the existence or contents of the decree referred to in the bill, except what it had derived from said Sprigg himself since the bill was filed; that it maintained that it was not to be, in any manner, concluded or affected by any knowledge or information which said Sprigg might have acquired in his private capacity, but nevertheless stated that said Sprigg had told respondent that he had no knowledge whatever of said decree, on or before either of said days, and that the first information he ever obtained of said decree was some time after the 4th of December 1846, when he was informed by Mr. Wm. J. Albert, that a decree existed which the said Sprigg supposed to be the one referred to in the bill.

That on the 4th of May 1842, the respondent discounted for Talbot Jones & Co. two notes for \$2500, which be-

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came due, respectively, on the 6th and 16th of June 1842; to secure which loan, Messrs. Talbot Jones & Co. deposited with the respondent a certificate of two hundred and eighty-two shares of stock of the Commercial and Farmers' Bank, made out in the name of the respondent, and brought to it by Samuel Jones, Jr., one of said firm, as the security for said loan; and the respondent supposed that on the said 4th of May, the transfer to it was made on the books of the Commercial and Farmers' Bank, but had never examined said books, and had no agency whatever in making said transfer, and no knowledge of it except what was contained on the face of the certificate, and did not know in whose name the stock stood previously to the transfer, or by whom the transfer was made, or that it was claimed by or belonged to any person except the said Talbot Jones & Co.

That it was the usual course, in lending upon the security of stock, for the borrower to deposit with the lender the certificate of the stock to be hypothecated, made out in the name of the lender, and previously transferred to him, and that it was entirely unusual, in such cases, and in all cases of the transfer of stock, for the transferees to examine into the transfers thereof, or to inquire in whose name the stock stood previously to the transfer, or by whom the transfers were made, but that a certificate of stock, regularly made out in the name of the transferee, as aforesaid, was considered as conveying a good title, behind which it was not the custom, nor was it considered necessary to look.

That on the payment of said notes, the respondent, by the usual power of attorney, authorized the re-transfer of said shares of stock, and supposed that the same was transferred into the name of Talbot Jones & Co. That on the 16th of August 1842, the respondent made a loan to Talbot Jones & Co., upon a hypothecation of two hundred and eighty-two shares of the stock of the Commercial and Farmers' Bank, transferred to it on the 17th of the same month; that the money so loaned was duly paid, but the respondent continued to retain the said shares of

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stock, standing in its name, and from time to time, made loans to said firm of Talbot Jones & Co., upon the faith and security of said stock, until February 1845, when a note of the said firm for \$5000 was discounted by the respondent, on the security of said stock, and at the same time, an agreement was made between them (filed with the answer) by which the respondent, on default being made in the payment of said note, or any of its renewals, was authorized to sell the said stock, and apply the proceeds to its payment; that said note was subsequently renewed from time to time, and on the first of August 1846, the note was given by way of renewal, which the respondent exhibited as part of its answer, which note fell due and was protested on the 4th of December 1846; that the note so exhibited was likewise discounted by the respondent for said Talbot Jones & Co., and with their consent, and upon the security of said two hundred and eighty-two shares of stock, transferred as aforesaid on the 17th of August 1842, and held by it at the time of said discount.

That when said first notes were discounted, there were no endorsers to them, and no security of any kind was given therefor, except the said stock, until the 17th of September 1844, when the note then given by Talbot Jones & Co. was endorsed by Jones, Burneston & Co., who continued to endorse the renewals, from that time, until the note above mentioned was given; but that the respondent looked mainly to said shares of stock as security for said loan and its renewals. That Andrew D. Jones was a member of the firm of Jones, Burneston & Co., and Samuel Jones, Jr., was sole member of the firm of Talbot Jones & Co.

That the first notice which the respondent received of the claim set up by the complainant to said stock, was a letter dated the 3d of December 1846, from William J. Albert, claiming to act as attorney for the complainant, to which the respondent replied by a letter dated about the 4th of December; that the respondent had every reason to suppose that said stock belonged to Talbot Jones & Co., and

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no one else, until the autumn of 1846, when, at a meeting of the creditors of Talbot Jones & Co., said Albert made an undefined claim to said stock. That said Samuel Jones, Jr., for a great number of years, was largely engaged in business by the name of Talbot Jones & Co.; that said firm, until long after the year 1842, enjoyed a very high degree of credit, and said Samuel Jones, Jr., during said period, and until his failure, possessed the entire confidence of the community as a man of integrity and honor.

That the note above mentioned, not having been paid at maturity, the respondent placed said stock for sale in the hands of Wm. Woodville, a broker in the city of Baltimore, and the same was sold, and the balance of the proceeds, after paying said debt, amounted to \$470 52, which had been carried to the credit of the suspense account of the respondent, in ignorance of what other disposition to make of it; that whilst said stock was pledged to respondent, the dividends were drawn by or paid over to the firm of Talbot Jones & Co., except a balance of \$157 92, which had been added to the said suspense account, making the amount of said account \$628 44. And that the respondent was a creditor of the firm of Talbot Jones & Co. for other loans, to a much larger amount than the said sum of \$628 44.

The answer of the president and directors of the Commercial and Farmers' Bank stated, that the said Talbot Jones, deceased, was, at the time of his death, as appeared by the books of the said bank, the owner of two hundred and eighty-two shares of the stock of said bank; that they did not know anything of the last will and testament of said Talbot, further than they had heard; and they believed that he left a will, and that his sons Samuel Jones, Jr., and Andrew D. Jones, the latter of whom, had lately departed this life, were the executors thereof; but the respondents had no knowledge, at the time, that said Talbot bequeathed said shares of stock to the complainant, or for her use, nor did they then know of said fact, further than by hearsay, and by the statement thereof in the bill.

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That they had no knowledge of the passing of the decree by the chancery court of Maryland, as stated by the complainant, and never heard thereof till after the failure of Samuel Jones, Jr., in July or August 1846; neither did they know of any apportionment of said stock, or any part thereof, under said decree, further than the same was disclosed by the bill aforesaid; they admitted that said shares of stock continued to stand on the books of the Commercial and Farmers' Bank, in the name of said Talbot Jones, until the said 4th day of May 1842, when a transfer of the same was made to the Merchants' Bank of Baltimore; and for the several transfers of said shares, at various times since, and by whom made, until the 11th day of December 1846, inclusive, they referred to copies from the transfer book of said bank, and a list of the names of the persons to whom they were finally transferred by William Woodville.

That they did not know that, at the time of the death of said Talbot Jones, the then president, and one or more of the directors of the Commercial and Farmers' Bank, knew the contents of the will of said Talbot, or that they knew of the existence of the decree aforesaid, but they thought it probable, from the connection existing between the then president, and the family of said Talbot, that at the time of the transfers to the Merchants' Bank of said stock, the contents of the will of the said Talbot were known to the then president of the Commercial and Farmers' Bank; but that said president was altogether ignorant of the making of said transfers, and did not in any manner or way sanction the same; that the transfers of said stock, made on the 4th of May and 17th of August 1842, were not, at the time, known to the then president of the bank, or to the respondents; they denied that said transfers were made with the sanction of the respondents, or of their then president, who would certainly have objected to the making thereof, in the manner in which they were made, had they known, at the time, of the intention of Samuel Jones, Jr., so to make them. They admitted that

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Andrew D. Jones, deceased, was a resident of the city of Baltimore, and they also stated that the dividends mentioned in said bill, amounting to \$592 20, were paid to the Merchants' Bank of Baltimore. They also admitted the insolvency of Samuel Jones, Jr.; that William B. Norman was an infant, and Daniel Sprigg was his guardian.

That at the time of the transfer of said stock, on the 4th of May 1842, there was in existence a by-law of their corporation on the subject of transfers by executors, and other legal representatives, a copy of which they filed, which was still unrepealed, and that until very lately, no evidence of the authority of executors or guardians to make transfers was required, other than a certificate of their appointment; that they believed and charged that the debt for which the said stock was hypothecated to the Merchants' Bank, on the 17th of August 1842, was fully paid by Talbot Jones & Co., and that it became and was the duty of the Merchants' Bank immediately on the payment of said debt, to re-transfer said stock to the said executors of Talbot Jones, and had it been so transferred, it would have placed it in the power of the respondents to prevent any further transfer of said stock; but that, instead of doing so, said Merchants' Bank, without having any lien thereon, or any proper authority so to do, retained said stock as its own, and afterwards, from time to time, discounted the notes of said Talbot Jones & Co., for different amounts, and at different times of payment; by which, as they alleged and charged, the Merchants' Bank made itself responsible for the value of said stock to the respondents, or to any one else having a just claim thereto, and more especially to those for whose use it was bequeathed in trust by said Talbot Jones, if there were any liability for the same to the said parties.

And the respondents, in answer to the interrogatories appended to the bill, said, to the first interrogatory, that they admitted the death of Talbot Jones in the year 1834, and that at the time of his death, he held two hundred and eighty-

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two shares of the stock of the respondent's bank, standing in his name on the books of said bank; and that the present officers of said bank did not know anything of the will of said Talbot Jones, further than by hearsay. To the second interrogatory, that at the time of the death of said Talbot Jones, it was not known to the officers of the bank, or to the bank, that said two hundred and eighty-two shares of stock were devised in trust, as stated in the bill, neither was it known that said officers or the bank knew of the decree of the high court of chancery, at the time of the passing thereof, or of the terms thereof, nor was it in any manner made known to the officers of the bank, till after the failure of Samuel Jones, Jr., in July or August 1846. To the fourth interrogatory, that on the 4th of May and 17th of August in the year 1842, Jacob Albert was president of said bank, and Joseph (not Robert) Taylor was a director, and it was known that Talbot Jones died several years before, and was believed to have died rich; but they did not know anything of the debts for which his estate was liable, nor when, nor in what manner they were paid, nor whether they were paid; and that it was not known that Jacob Albert and Joseph Taylor were acquainted with the contents of said will. To the fifth interrogatory, that until the 4th of May 1842, said two hundred and eighty-two shares of stock stood in the name of the said Talbot Jones, but the transfer thereof by Samuel Jones, Jr., on that day, and not the 17th of August following, was not made with the sanction or knowledge of Jacob Albert, the then president of the respondent's bank, who did not know thereof, until a considerable time after they had been a second time transferred to the Merchants' Bank; and they said, that had their then president known of the intention of said Samuel or Andrew Jones to make said transfers, he would have objected and not consented thereto. To the sixth interrogatory, that at the times of said transfers, there was in existence a by-law of their corporation on the subject inquired of, which was still in force, of which they annexed a copy, and they did not know whether any authority was



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filed or deposited at the time said transfers were made. To the eighth interrogatory, that Andrew D. Jones died in August or September 1856, and at the time of his death, was a resident of Baltimore city, and in business there as a merchant; that Samuel Jones, Jr., was insolvent, and that Daniel Sprigg, they believed, was the guardian of William B. Norman, a minor.

The by-law referred to in the answer was in these words:

"SECT. 10. The stock of the company shall be transferable on the books, only by the person in whose name it appears, or by his duly authorized attorney or representative. In all cases of transfer by attorney, the original letter of attorney, duly proved, shall be deposited and remain with the bank. And in case of transfer by executors, administrators or guardians, or other legal representatives, duly authenticated evidences of their authority shall be deposited and remain in the bank. No transfer shall be made, until the certificate granted to the transferrer shall be produced at the bank."

The answer of William J. Albert and Emily his wife, and Josiah Jones, Jr., admitted the statements of the bill so far as they were within their knowledge, and denied the validity of said transfers as against their residuary interests therein.

The answer of Samuel Jones, Jr., admitted the death of Talbot Jones in March 1834, the bequest of said stock, the passage of the decree in chancery, the transfers of said stock, the death of Andrew D. Jones, who at the time of his death was a resident of, and doing business in, Baltimore, his own insolvency, the infancy of William B. Norman, and the appointment of Daniel Sprigg as his guardian.

A good deal of testimony was taken, the effect of which is sufficiently stated in the opinion of the court.

The case was argued at April Term 1848, and the opinion of the court was delivered by—

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TANEY, C. J. In order to understand the points which arise in this case, it is necessary to state the facts somewhat in detail.

Talbot Jones, of the city of Baltimore, died in the year 1834, having first duly made his last will and testament, and appointed his sons, Samuel Jones and Andrew D. Jones, his executors, to whom letters testamentary were granted in the same year. The testator died possessed of a large amount of property of different kinds, and owned, at the time of his death, two hundred and eighty-two shares of stock in the Commercial and Farmers' Bank of Baltimore, standing in his name on the books of the bank. The dividends upon this stock is the matter of dispute.

The testator, by his will, bequeathed it, in trust for the complainant, during her life, in the following words: "I order and direct that my executors hereinafter named, or the survivor or acting one of them, shall receive the dividends, from time to time declared and made payable on my stock in the Commercial and Farmers' Bank of Baltimore, in trust, that the said dividends shall be paid over or remitted by my executors, or the survivor or acting one of them, to my sister, Maria Lowry, now or lately of Dublin, in Ireland, during her natural life, and after her decease, to her daughter Mary Lowry, should she survive her mother, during the lifetime of the said Mary."

And in the succeeding clause of the will, this stock, together with other property, and also the general residue of his estate, is bequeathed to Samuel Jones and Andrew D. Jones and the survivor of them, and the "heirs, executors and administrators of such survivor, in trust for sundry persons named in the will, in certain proportions therein mentioned," subject to the devise of the dividends (on the stock) to his sister and daughter as aforesaid.

In 1839, upon a bill filed in the chancery court of the state by some of the parties interested, for the partition of the property bequeathed in the last-mentioned clause of the

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will, a decree was passed directing, among other things, that Samuel Jones and Andrew D. Jones should hold these two hundred and eighty-two shares of stock, in trust to pay the dividends to Maria Lowry, during her life, and after her death to be divided as mentioned in the decree: Mary Lowry, the daughter, died before the devise was made.

In this proceeding, Maria Lowry, the complainant, was made a defendant, and the bill taken *pro confesso* against her, upon publication in the usual form; but process was never served upon her; nor did she appear or answer; nor had she any interest whatever in the suit. By the decree, Michael B. Norman, Josiah Jones, and Emily J. Albert, are entitled to this stock upon the death of Mrs. Lowry; and on that account, it has been supposed to be advisable to make them parties in the case before the court.

After the death of Talbot Jones, Samuel Jones carried on business, on his individual account, in the name of Talbot Jones & Co.; and the transactions in the name of Talbot Jones & Co., mentioned in these proceedings, are the transactions of Samuel Jones, on his own individual account.

The stock in question continued to stand on the books of the Commercial and Farmers' Bank in the name of Talbot Jones, until 4 May 1842, when it was transferred to the Merchants' Bank by Samuel Jones; the other executor not joining in the transfer. This transfer, it appears, was made as security for a loan obtained by Samuel Jones from the Merchants' Bank, on his own private account, under his mercantile style and name of Talbot Jones & Co., and the money being afterwards paid, the stock was transferred to him by the bank, under the same name and style, on the 17th June in the same year; and on the 20th of the same month, transferred by him as Talbot Jones & Co. to himself and Andrew D. Jones, as executors of Talbot Jones. On the 20th of August following, Samuel Jones, signing his name as acting executor, again transferred this stock to the Merchants' Bank, which continued to hold it

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as a pledge for sundry loans of money made, from time to time, to Talbot Jones & Co., until the 11th of December 1846, when it was transferred to a broker, and sold to pay a note which fell due on the 4th of that month, and had been protested for non-payment.

Talbot Jones & Co., that is to say, Samuel Jones, stopped payment in September 1846, and in January 1847 petitioned for the benefit of the insolvent laws of this state; it is admitted on all hands, that he is utterly insolvent, and unable to pay any part of the dividends due to the complainant. After the last transfer to the Merchants' Bank, the dividends were either paid to its orders in favor of Talbot Jones & Co., or were drawn by the bank and paid over to him, with the exception of the last dividend, which fell due before the stock was sold. This is yet in the hands of the bank, except the sum of thirty-nine dollars and forty-eight cents which has been paid out of it for taxes on the stock. Notwithstanding the transfer of the stock in 1842, the amount of the dividends were regularly paid over to the complainant by the executors, until November 1845; but the dividend declared at that time has not been paid to her, nor any of those subsequently. She had no notice of the transfer of the stock until October 1846, after the last of the loans above mentioned had been made by the Merchants' Bank; and on the 3d of December following (the day before the note became due), she gave the bank notice of her claim.

When the stock was first transferred by Samuel Jones to the Merchants' Bank, a certificate was issued by the Commercial and Farmers' Bank, in the following words:

Commercial and Farmers' Bank of Baltimore.

No. 707.

May 4, 1842.

This is to certify that the Merchants' Bank of Baltimore is entitled to two hundred and eighty-two shares in the capital stock of the Commercial and Farmers' Bank of Baltimore, on each of which thirty dollars have been paid,

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but which have since been reduced by the act of assembly to twenty dollars a share. Transferable at the bank only, personally or by attorney.

TRUEMAN CROSS, Cashier.

282 shares.

This certificate was delivered by Samuel Jones to the Merchants' Bank, when he obtained the first loan, and was re-delivered to him when the money was paid and the stock transferred to Talbot Jones & Co.; a similar certificate was again issued by the Commercial and Farmers' Bank, when the second transfer was made to the Merchants' Bank, and was retained by it, until the stock was transferred to the broker to be sold, as hereinbefore mentioned.

This is a summary statement of the facts, so far as they are material to the decision of the case. It is very clear, that the money due to the complainant has been grossly misapplied; and the question is, whether she is entitled to relief against the banks, or either of them. Samuel Jones is undoubtedly liable; but as he is admitted to be insolvent, she can obtain no redress from him.

As concerns the Merchants' Bank, we see no ground upon which it can be liable beyond the amount of dividends remaining in its hands. It does not appear that the bank, when it accepted the pledge of this stock, or when it made its loans, had any reason to suppose that the stock had ever been held by Talbot Jones, or that it was transferred to the bank by Samuel Jones, as one of his executors. In order to obtain the loan upon the pledge of this stock, Samuel Jones did nothing more than produce the certificate of the Commercial and Farmers' Bank, showing that the two hundred and eighty-two shares of stock had been transferred to the Merchants' Bank; but the certificate did not show by whom it had been transferred, nor to whom it had previously belonged; and according to the usual course of business, the presumption was that it belonged to Samuel Jones himself. The Merchants' Bank appear to have

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acted under this impression; for when the first loan was paid, and the lien of the bank thereby released, it transferred the stock to him individually, by the name of Talbot Jones & Co., and not to the executors of Talbot Jones.

It is very true, that the instrument of transfer upon the books of the Commercial and Farmers' Bank showed it to have been made by Samuel Jones, in his character of executor; and in general, a party must be presumed to have notice of everything that appears upon the face of the instrument under which he claims title. But a transfer of stock cannot, in this respect, be likened to an ordinary conveyance of real or personal property. The instrument transferring the title is not delivered to the party; the law requires it to be written on the books of the bank in which the stock is held; the party to whom it is transferred rarely, if ever, sees the entry, and relies altogether upon the certificate of the proper officer of the bank, stating that he is entitled to so many shares, that is to say, so many shares have been transferred to him by one who had a lawful right to make the transfer.

The case of *Davis v. Bank of England*, 2 Bing. 393, is a strong one on this head. The three per cent. consolidated annuities created by the English government, were made payable at the Bank of England, and transferable at the bank, in the manner pointed out by law; a large amount of these annuities, which belonged to the plaintiff in that case, and stood in his name, were transferred under a forged power of attorney; the property did not pass by this transfer. Yet the court held, that subsequent *bonâ fide* purchasers from the fraudulent transferree, whose name had been registered in the books of the bank as the owner, were entitled to recover from the bank the amount of dividends falling due on these annuities, although the bank was also liable to the true owner of the stock, whose name had been forged.

In this case, indeed, the executor had a legal capacity to make the transfer, and the legal title to the stock passed

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to the Merchants' Bank; and as it paid a valuable consideration, and had no notice, actual or constructive, of any violation of trust, upon which the transfer could be impeached in equity, it had a right to sell the stock for the payment of the note for which it was pledged, and to make the purchasers a valid title. A different rule would render the right of every purchaser of stock in a bank insecure or liable to doubt, and greatly impair its value, and would, moreover, seriously disturb the usages of trade and the established order of business in relation to this subject, in a manner highly injurious to the community; for purchasers always rely on the certificate of the bank in which it is held, as conclusive evidence of the ownership. Most commonly, the purchase is made through a broker, and the buyer does not know who is the seller or who makes the transfer; the certificate of the bank tells him that he is entitled to so many shares, and he pays his money upon receiving the certificate, without further inquiry. It would be unjust and inequitable, to charge the stock in his hands with any equitable incumbrance or trust, however created, which was not known to him at the time he paid his money.

As respects the Commercial and Farmers' Bank, the claim of the complainant rests upon different grounds. (By the charter of the bank (like that of every other bank incorporated by a law of this state) the stock is transferable at the bank only, and according to such rules as shall be established by the president and directors.) It cannot, therefore, be transferred without the supervision of the officer designated for that purpose by the bank. (The corporation is thus made the custodian of the shares of stock, and clothed with power sufficient to protect the rights of every one interested, from unauthorized transfers; it is a trust placed in the hands of the corporation for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its neg-

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ligence or misconduct. Upon this principle, the bank was held liable for an improper transfer of its stock, in the case of the Farmers' and Merchants' Bank and others *v. Wayman & Stockett*, decided in the Court of Appeals of this state, at December Term, 1847, and the case of *Davis v. Bank of England*, hereinbefore referred to, where government stocks were made transferable on the books of the bank, was decided upon the same ground. As the corporation appoints the officers before whom the transfers must be made, it is responsible for their acts, and must answer for their negligence or defaults, whenever the rights of a third person are concerned. *Hodges v. Planters' Bank of Prince George's County*, 7 Gill & Johns. 306, 310.

Undoubtedly, the mere act of permitting this stock to be transferred by one of the executors, furnishes no ground for complaint against the bank, although it turns out that this executor was, by the act of transfer, converting the property to his own use; for an executor may sell or raise money on the property of the deceased, in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. Such is the doctrine of the English courts, and would seem to have been the law of this state, prior to the act of assembly of December Session 1843, ch. 304; and the transaction now before us took place before that act went into operation. But it is equally clear, that if a party dealing with an executor, has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured. The cases upon this subject are numerous, and it would be tedious to refer to them particularly; they are for the most part collected and commented on in the cases of *McLeod v. Drummond*, 17 Ves. 152, and of *Field v. Schieffelin*, 7 Johns. Ch. Rep. 150.

It is very true, that in the case before us, the pledge of stock was not made to the Commercial and Farmers' Bank,



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nor did it loan the money to the executor. But a party is not made liable because he pays or advances money for property of the deceased; but because, by doing so, when he has reasonable ground for believing that the executor means to misapply it, he knowingly assists him in committing a breach of his trust. In this case, the rights of stockholders, and of persons interested in its stock, were placed by law under the guardianship and protection of the bank, so far as concerned the transfers on their books; the stock could not be transferred, could not become the legal property of another person, without the permission of the proper officers of the corporation. *Union Bank v. Laird*, 2 Wheat. 393. And if these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction. The object of the executor could not have been accomplished without the co-operation of the bank in permitting the transfer to be made on its books.

The question then is, had the bank at the time of the transfer, actual or constructive notice that the executor was abusing his trust, and applying this stock to his own use? The bank, by its answer, denies that it knew anything of the contents of Talbot Jones's will, or of the bequest to the complainant; and there is no proof of actual notice; but it did know that this stock was the property of Talbot Jones at the time of his death, for it so stood upon its own books; and as the transfer was made by, Samuel Jones, as his executor, the bank must, of course, have known that Talbot Jones left a will. Although it may not have had actual notice of the contents of the will, yet as it was dealing with an executor in his character as such, the law implies notice; this is the doctrine in the English court

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of chancery. 4 Mad. 190. And the rule appears to stand upon still firmer ground in this state; for now it is settled, that every person has constructive notice of a deed for real or personal property, where it is duly registered according to law; in England, the weight of authority is perhaps to the contrary. Now, in Maryland, every will of real or personal property is required to be recorded; and if third persons are bound, at their peril, to take notice of a registered deed, when there is nothing to lead them to inquiry, the obligation must be still stronger upon one who is dealing with an executor concerning the assets of the deceased; for his character of executor, of itself, gives actual notice that there is a will open to inspection upon the public records.

The bank, therefore, was bound to take notice of the will when this transfer was proposed to be made by one of the executors; and is chargeable to the same extent as if it had actually read it. It was negligence in the bank not to examine it; and if it was ignorant of the contents of the will and of the specific bequest of this stock, it was its own fault. It must be dealt with in this case, as if it had possessed actual knowledge that the stock in question was specifically bequeathed by the testator, and was not by the will to be transferred, or in any manner disposed of, by the executors, during the lifetime of the complainant; and that it was the duty of the bank, during that time, to pay the dividends to them in trust for the complainant.

Undoubtedly, this stock, although thus specifically bequeathed, was yet liable to be sold, if necessary, for the payment of the debts of the testator; and if the bank did not know, or had no reasonable ground for supposing, that the executor was misapplying the assets, it would not be responsible, notwithstanding its implied knowledge of the will. But when the second transfer (under which the stock was finally sold) was made to the Merchants' Bank, the circumstances then within the knowledge of the Commercial and Farmers' Bank, were abundantly sufficient to satisfy any reasonable mind, that Samuel Jones was

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using this stock for his private purposes. This transfer took place on the 20th of August 1842; the bank at that time knew that Talbot Jones had been dead eight years; that he died rich; and that the time had long before elapsed within which the law of Maryland requires an estate to be settled up by an executor or administrator. It appeared by their own transfer books that, on the 4th of May preceding, the same stock had been transferred by Samuel Jones to the same bank (the other executor, although he resided in town, not being a party to the transfer); that on the 17th of June, in the same year, it was re-transferred by the Merchants' Bank to Samuel Jones in his individual right, under the name of Talbot Jones & Co., and by him restored to the estate of the testator, a few days afterwards, by a transfer to himself and the other executor. And when, after these transactions, all appearing on the books of the bank, he came again, without his co-executor, to transfer it a second time to the Merchants' Bank, could the officers of the Commercial and Farmers' Bank doubt the purposes for which this second transfer was made? Familiar as they must have been with the usual course of business in the banks, and the usage of loaning money upon hypothecation of stock, could they have failed to see that Samuel Jones was misapplying the assets of the testator, and pledging this stock for his own individual benefit?

Indeed, the bank, in its answer, does not deny it, but on the contrary, impliedly admits it; for the answer states that, if the president had known that the transfer was about to be made by Samuel Jones, he would have prevented it. Now, the bank is equally chargeable for the neglect or omission of duty by the officer to whom it had committed the superintendence of the transfers of stock, as it is for the neglect or omissions of its president; and such officer was also equally chargeable with implied notice of the will of Talbot Jones, and equally bound to refuse the transfer when he saw that Samuel Jones was using this stock in

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violation of his trust as executor. And if the circumstances above mentioned were not sufficient to satisfy the bank officer, beyond all reasonable doubt, that he was so using them, yet they were certainly sufficient to create strong presumptions against him, and to make it the duty of the officer to inquire before he allowed the transfer to be made. If he neglected to make the inquiry, when the fact could have been so easily ascertained, and either from negligence or design, without inquiry, enabled the executor to convert the stock to his own use, the bank is responsible for this negligence.

There is another circumstance also, which ought, of itself, to have created strong doubts in the mind of the transfer officer of the bank. By the act of assembly of Maryland of 1798, sect. 3, it is in the power of the executor to procure an order of sale from the orphans' court, whenever a sale shall be necessary. It is true, that in the case of *Allender v. Riston*, 2 Gill & Johns. 86, the opinion of the court would seem to have been that, notwithstanding this act of assembly, an assignment by an executor, for his own debt, would be valid against the creditors of the estate, unless there was collusion with the executor. But the case was not decided on that point; nor does the opinion of the court apply to an assignment of property specifically bequeathed; nor was that point in the case, or raised in the argument. However that question shall be ultimately decided, it may, we think, be safely asserted that, in practice, under this law, there has been no instance in Maryland, since its passage, in which an executor, acting fairly and *bonâ fide*, has undertaken to sell or pledge personal property, specifically bequeathed, without a previous order from the orphans' court. And the proposition of Samuel Jones, one of two executors (the other executor not uniting in the transfer), to transfer this stock, so long after the death of a wealthy testator, without first obtaining an order from the court to justify him, must have satisfied any man of common experience in business that he was grossly abusing

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his trust. In South Carolina, under a law very similar in its provisions, it has been decided that the sale of such property by an executor is void, unless made by the authority of the court. (4 Desau. Ch. 522.) And we think there are strong reasons to support this decision.

The cases referred to in relation to transfers of government stocks by the Bank of England do not apply to this case. They are collected in 1 Danl. Ch. Pr. 139, and they all turn upon the meaning and policy of the acts of parliament by which the management of the public stocks and annuities was given to the Bank of England. It is with reference to the duties imposed by these acts of parliament, that the court say, that the Bank of England is not bound to take notice of a trust affecting public stock standing on its books, and must look only to the legal estate. But this opinion cannot influence the decision of this case; because the privileges and obligations of the bank must be determined by its own charter, differing widely in its terms and its object from the English acts of parliament. Certainly, none of the English acts convey the idea that, upon general principles of law, a bank is not bound to notice a trust of its own stock, and must look only to the legal estate; for a bank or any other corporation is bound by the same obligations, moral and legal (when the rights of third parties are concerned), that apply to the case of an individual, unless it is explicitly exempted by law. If an individual who confederates with an executor, and assists him in defrauding his *cestui que trust*, is liable to the party injured, there can be no reason why a bank which knowingly enables an executor to convert the property of the *cestui que trust* to his own private use, should not be equally responsible. The difficulties to which the Bank of England would be subjected, if bound to take notice of the trusts in the government stocks, and which are strongly stated by the Chancellor in the case of *Hartga v. Bank of England*, 3 Ves. 58, are altogether inapplicable here; for, putting aside the immense differ-

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ence in amount and character between the government stocks of England and the stock of this bank, a chancery suit can never be necessary in this state for the protection of the bank, where stock bequeathed in trust is required to be sold for the payment of debts; because, under the act of 1798, an order for the sale, by the orphans' court, which could at any time be obtained in a summary way, without delay and without expense, would protect the bank from all responsibility, and occasion no delay or embarrassment in the payment of debts.

The case then is this: the will of the testator, in effect, directed that this stock should not be sold or transferred during the lifetime of the complainant, and the dividends, during that time, should be received by his executors and paid over to the complainant. One of these executors proposes to transfer this stock, in order to raise money on it for his private purposes; and the officers of the bank, knowing the purpose for which it was transferred, or with circumstances before them sufficient to create a strong presumption that such was the intention of the executor, and therefore, sufficient to put them on inquiry, permit the transfer and certify that the transferee is entitled to the stock. Relying on this certificate, the Merchants' Bank was induced to loan its money upon it, and having no knowledge that it ever belonged to Talbot Jones, or had been transferred by his executor, the stock cannot be followed in its hands, or the hands of those to whom it afterwards sold it, and charged with the trust created by the will. The executor is insolvent, and there is, therefore, no effectual remedy against him. Ought the loss to be borne by the complainant, who has committed no fault and been guilty of no negligence, or by the Commercial and Farmers' Bank?

The established principles of equity seem to require that the loss should be borne by the party by whose negligence or misconduct it was occasioned. The bank not only enabled the executor to perpetrate the wrong by

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permitting the transfer, but co-operated in it, by certifying that the title of transferree was good; justice, therefore, requires that it should bear the loss.

The only remaining question is, the nature of the relief to be administered by the court. In order to do substantial justice, it is evident, that the decree must be directly against the bank, as Samuel Jones is admitted to be utterly insolvent.

The complainant's claim is for dividends only; she has no property in the stock, which belongs to the defendants, William B. Norman, Josiah Jones and Emily J. Albert, in certain proportions, who will be entitled to the dividends after the death of the complainant. Yet, if there were no difficulty on the score of jurisdiction, the court would, according to the practice of courts of chancery, proceed to dispose of the whole matter in dispute, and decree as to the stock, and the balance in hand in the Merchants' Bank, as well as the dividends. But the jurisdiction of this court is founded upon the fact that the complainant is an alien; it has no jurisdiction in the controversies between the defendants, as they all reside in Maryland. Undoubtedly, if the case of the complainant could not be disposed of, and relief administered to her, without deciding upon the rights of all the parties before the court, we should necessarily dispose of the whole matter, and decree as to the stock, as well as the dividends. But the rights of the complainant may be adjusted, without interfering with the right of the claimants of the stock, or with the balance arising from its sale, which yet remains in the hands of the Merchants' Bank; for it is immaterial to the complainant, whether the stock be replaced or not. All that she has a right to demand is, that the amount of dividends on two hundred and eighty-two shares of stock, which she has lost by the negligence or the misconduct of the officers of the bank, shall be paid to her, as if the stock had never been transferred. The jurisdiction, therefore, to

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decree in the controversy as to the stock, cannot, we think, be maintained.

We have said nothing of the decree of the chancery court of Maryland, which has been filed in the case; neither of the banks were parties to the proceedings in that case, nor do they appear to have had notice of it; neither was the complainant a necessary party; she had no interest in the property to be divided; it was not proposed to change or modify, in any respect, the trust in her favor; and the decree passed by the court leaves her interests precisely where they stood before.

In regard to the stock itself, the decree for partition has, in a material respect, changed the character of the trust; for the two executors, instead of holding it, in undivided portions, for the *cestuis que trust* named in the will, hold under the decree, as trustees for those to whom it has been specially assigned in severalty. And it may be doubted, whether this circumstance does not form an additional objection to the jurisdiction of this court in regard to the stock; and whether Samuel Jones and Andrew D. Jones ought not to be considered as trustees, appointed in that respect by the court of chancery, to hold this stock in trust for *cestuis que trust* named in the decree, and therefore, responsible for their conduct to that court, rather than to a court of the United States. It is, however, not necessary to examine this question, because it does not affect the dividends bequeathed to the complainant, and certainly, can form no objection to the jurisdiction in her case.

It appears from the evidence, that the stock sold for more than enough to pay the note for which it was hypothecated; and that, besides the surplus arising from this sale, one of the semi-annual dividends upon these two hundred and eighty-two shares remains in the hands of the Merchants' Bank, deducting therefrom the amount paid by the bank for taxes on this stock; the amount of the dividend remaining in the hands of the Merchants' Bank, subject to the deduction aforesaid, belongs in equity to the



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complainant, and for that amount she is entitled to a decree against the Merchants' Bank. For the residue of the dividends due to her, and remaining unpaid, the Commercial and Farmers' Bank must answer.

The case must be referred to a master, to state an account according to this opinion, preparatory to a final decree.

*J. Mason Campbell*, for complainant.

*Brown and Brune*, for the Merchants' Bank.

*R. Johnson and Sam'l J. Donaldson*, for the Commercial and Farmers' Bank.

MEADE and OTHERS, for the EDUCATION SOCIETY  
OF VIRGINIA,

*vs.*

BEALE and LATIMER.

A citizen of Maryland, by his will, dated the 6th of March 1836, bequeathed "to the Education Society of Virginia, for the benefit of the theological students at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars, the interest only to be annually expended." The object of the bequest was an unincorporated and voluntary association of individuals to take in succession.

On a bill filed to enforce this bequest, *held*: that the case must be governed by those of *Dashiell v. Attorney-General*, and consequently, the bequest was void.

It does not follow that, because such a bequest would be maintained in England independently of the statute of 43 Eliz. ch. 4, it will also be maintained in Maryland.

The case of *Vidal v. Girard College*, does not affect this case, as the decision of that case was founded on the common law of Pennsylvania.

This case must be decided on the doctrines of the Maryland law, as recognised and established by judicial decisions; and the two cases of *Dashiell v. Attorney-General* are conclusive against the validity of the bequest in question.

The circuit courts of the United States administer the laws of the states in which they sit, unless those laws are in conflict with the constitution of the United States, or its treaties, or the acts of congress.

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These courts regard the decisions of the highest judicial tribunals of the state, when based upon the laws of the particular state, as conclusive evidence of the law affecting the right or claim in dispute.

In cases depending upon the usages of commerce, and the general principles of commercial law, where the state court does not decide the case upon any particular law of the state, or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive evidence of the commercial law of the state; and will not be followed by the supreme court.

In regard to equitable rights, the power of the courts of chancery of the United States is, under the constitution, to be regulated by the law of the English chancery.

But this rule applies to the *remedy*, not to the *right*. It is the *form* of the remedy for which the constitution provides; and if a complainant has no *right*, the circuit court sitting as a court of chancery has nothing to remedy in any form of proceeding.

Circuit Court, November Term, 1850. In Equity.

This bill was filed against the defendants, as executors of Philip J. Ford, deceased, late a citizen of Maryland, by William Meade, Edward McGuire, John Hooff, Philip Williams, and John Johns, citizens of Virginia, on behalf of themselves, and all others the members of the Society for the Education of pious young men for the Ministry of the Protestant Episcopal church; said society having its place of business in Virginia, and being there situated, and all the members thereof being either citizens of that state or of other of the United States than Maryland.

The bill stated that, on the 6th of March 1836, the said Philip J. Ford made and published his last will and testament in writing, whereby, amongst other things, he gave to the Society for the Education of pious young men for the Ministry of the Protestant Episcopal church, by the name of the Education Society of Virginia, for the benefit of the theological students at the theological seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars, the interest only to be expended. That the testator having departed this life leaving said will unrevoked, the same was duly proved in the orphans' court of

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Charles county, Maryland, and the execution thereof assumed by the defendants. That the assets received by the executors were large, and amply sufficient to liquidate the whole of the said legacy in due course of administration.

That the said Society for the Education of pious young men for the Ministry of the Protestant Episcopal church, whereof the complainants were members, and on behalf of which they sued, was commonly known and designated by the name of the Education Society of Virginia, and was the same society so designated by the testator in his said will; and that the place of the annual meeting of said society was now, and always had been, at the theological seminary of the Protestant Episcopal church in the diocese of Virginia, situated in Fairfax county, in said state. That the said society was composed of about two hundred members, who resided in various states of the Union, remote from each other. That, according to the constitution of said society, the affairs of the same were committed to the management of a board of directors, which consisted of the president, four vice-presidents, the secretary, the treasurer and thirty managers, who were all appointed annually, at their annual meeting at the said theological seminary. That the complainants were, at the death of the testator, and had been, ever since, members of said society and of its board of directors.

That it was the duty of said board of directors, among other things, to determine on the propriety of accepting and approving of the candidates for the aid of the society aforesaid, in the prosecution of their education for the ministry aforesaid, selected and recommended by the standing committee, composed of four members of said board of directors, and upon the approval of the persons so recommended, it was the duty of said standing committee to appropriate and furnish the funds and assistance from the treasury of the society aforesaid, to the said beneficiaries. That said beneficiaries were bound to prosecute their studies at said seminary, under the direction of

its professors, unless such condition were dispensed with by the standing committee; and they were provided with board and other necessities by said seminary, which was provided for and supported, so far as the board of the students there is concerned, by said society. That said seminary was in full existence as a theological school; and the said society, through its board of directors, had been for many years before the death of the testator, and had continued ever since, in full existence and organization, and prosecuting successfully the objects of its formation, precisely in the same manner as at the time of the publication of the testator's will and at the time of his death. Prayer for discovery and relief.

The will of the testator, so far as it related to this bequest, was as follows:

"I give and bequeath to the Education Society of Virginia, for the benefit of the theological students at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars, the interest only to be annually expended."

To this bill, the defendants demurred generally, and the case was submitted, upon written arguments, upon the demurrer.

*J. M. Campbell*, in support of the demurrer, contended—

1. That the legacy was void, being in violation of the 34th art. of the Bill of Rights of Maryland.

2. That the legatee not being incorporated, the legacy was void for want of a competent person to take. 2 Story's Com. § 1147; 3 Peters 497.

The statute of Elizabeth (43 Eliz. ch. 4), it is true, supplies the defect of want of a charter, but without that statute, in England, and where it is not in force in this country, the legacy is void. The statute is not in force in Virginia, and such a legacy is void there. *Trustees of Baptist Association v. Hart*, 4 Wheat. 1; 3 Peters 481.

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In Pennsylvania, the statute of Elizabeth is not in force, as to its mode of proceeding, but it is, as to the principles involved, 2 How. 192, and the supreme court of the United States, in the case of Girard's will, in 2 Howard, while upholding the legacy there given, under the law of that state, refers to and adopts the principle of the case in 4 Wheaton, as applicable, where the statute of Elizabeth is not in force.

In Maryland, the statute of charitable uses (43 Elizabeth) is not in force, 5 Har. & Johns. 398; and on page 401 of that volume the very case of a devise to persons in succession, not incorporated, is put by the court.

*R. J. Brent*, for complainant.—The doctrine of charities and conveyances to charitable uses has been so fully discussed in the opinion of the supreme court, in *Vidal v. Girard's Ex'rs*, 2 How. 194, that we can only refer to that decision as finally settling the law on this subject, and conclusively settling that such devises could be enforced in equity, independently of the statute of Elizabeth, thus virtually overruling the contrary decision made by our court of appeals, in *Dashiell v. Attorney-General*, 5 Har. & Johns. 400, which was based on the mistaken notion that chancery had no jurisdiction previously to that statute.

The question, therefore, recurs whether the circuit court will not, in such a case, rather follow the federal decisions than the state decision? If so, the sole remaining question is, whether this legacy, as claimed, is not a charity? which will clearly appear by reference to the bill.

*Henry Winter Davis*, on the same side.—The case is succinctly and accurately stated by the defendant's counsel; and in the two points insisted on, the merits of the case are fairly met.

1. The law of charitable bequests is not dependent on the statute of 43 Elizabeth, but is a part of the common law, prior to and more comprehensive than that statute.

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2. The bequest of Ford's will is such, as within the principles of the law of charitable bequests, is valid and enforceable by bill in equity.

3. The bill of rights of Maryland does not affect the matter.

I. The elements of a perfect trust are, a trustee, a subject, and an object or beneficiary competent to take.

The want of a trustee will always be supplied by equity, and is not suggested or relied on here. The subject here exists in the legacy. The object or beneficiary is the party stated in the bill. It is an unincorporated, voluntary association, and it is on this that the objection of its incompetency rests.

The purpose of the trust—the education of youths for the ministry—is directly within the immediate scope of the organization of the society, and we suppose is conceded to be a charitable purpose, which would be sustained and effectuated, if the body designated to take the fund be competent to take.

In all cases there must be a beneficiary sufficiently certain and definite, or any gift or bequest will be void. That certainty varies with the subject-matter of the gift or bequest, and the objects to which it is directed. It may either be a natural person, or a corporate person, or a more indefinite body, such as a religious congregation, a voluntary association, or the public—either the whole commonwealth, or limited portions of it. The first two are the ordinary objects of gifts and bequests. The third class is recognised as competent to take property—not generally, but only for specified purposes. The individual can take for all purposes, generally; the body corporate only for purposes within the scope of its charter. When the bequest or gift is for certain public or charitable purposes, an enlarged policy has relaxed the rigid rules which define the certainty of a competent donee, where individuals are concerned, and indefi-

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nite gifts and dedications are recognised and enforced. One class of such cases is, that in which dedications to the public, or to particular societies, have been protected; such was the case of the Mayor, &c. of New Orleans v. United States, 10 Peters 662, where the proprietors of the soil had laid out a town, and on the plat had designated a portion as "the quay," and the court held it a valid dedication to the public; and remarked that, without such dedications, an advanced state of society could not exist; and that the right might exist in the public at large, or in a definite part of it, without the intervention of a corporation (page 713). Similar principles are reiterated in the cases of Cincinnati v. Lessees of White, 6 Pet. 431; Barclay v. Howell's Lessee, 6 Pet. 499; and Beatty v. Kurtz, 2 Pet. 566; in which latter case, a piece of ground marked on the plan of Georgetown "for the Lutheran church," an unincorporated society taking in succession, was protected from violation, as a place of burial for the dead, validly dedicated to the public, and to pious uses.

Such gifts as the above, to an individual, would have been void: to the public, the citizens of the town, the religious congregation—for those particular purposes, they were valid; and the persons intended to enjoy the gift were vague and uncertain, shifting, unascertained, unincorporated, and not protected by the intervention of trustees. The cases are thus far directly in point; they suffice to remove all *à priori* presumptions against the existence of other cases, embraced by their principles, where the rules relative to gifts or bequests to individuals for private purposes do not operate to avoid the gift. They lay the foundation for the principle, that for public purposes relative to the religion, the commerce, the municipal conveniences, the education of the people, the laws of limitation and conveyancing are not the same which govern the disposition of private property between private persons; but that an indefinite public may have rights which courts will protect. It is this principle which lies at the foundation,

and is the origin of charitable bequests of an indefinite nature, whereby transfers of property—void if between private persons for private purposes—are taken under the protection of the courts, when applied to public or charitable uses. Within it, gifts or bequests for the establishment of schools or colleges, for the education of ministers or orphans, for the support of ministers, for the benefit of dissenting congregations, unincorporated, for the erection of light-houses, bridges, &c., are protected. The fact that such gifts are protected in England, and in certain states of this union is conceded; but it is denied that they are so protected on the above principle, but only by virtue of the statute of charitable uses (43 Eliz. ch. 4).

We had supposed this principle at rest before the courts of the United States, since the case of *Vidal v. Girard's Ex'rs*, 2 Howard 127; but it would seem that the counsel for the defendants entertains a different view of that case. It is true, that it was held, in conformity with the case of *Zimmerman v. Anders*, 6 W. & S. 218, that the conservative provisions of the statute of Elizabeth were in force in Pennsylvania; but it is equally true, that that statute has been held not to be in force in Pennsylvania, and also that, independently of it, the more extensive range of charitable uses which chancery supported before that statute, and beyond it, were held to exist in that state; and that, after an elaborate examination of the cases, the supreme court solemnly affirmed the doctrine of *Sugden in 1 Drury & Warren* 258, that courts of equity have, independently of the statute of Elizabeth, an inherent jurisdiction in cases of charity; that cases of charity, in courts of equity in England, were valid prior to the statute of Elizabeth, and that from the more recent cases, and the result of recent investigations, such was the case at the common law prior to the statute; and therefore, without reference to the cases from the Pennsylvania reports, those doctrines would be part of the common law of Pennsylvania. 2 Howard 197, 198.



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Indeed, it is plain, such must have been the case, for Stat. 43 Eliz. only created a new tribunal for the enforcement of acknowledged rights; its language creates no new right, nor makes one valid which before was void; and if its modes of proceeding were not in force, nothing remained to be in force; for the rights it protected were old rights, which fraud had invaded, but not nullified in the eye of the law. The courts of Pennsylvania were, therefore, very accurately discriminating, when they held the *statute* not in force, but that the *principles* chancery had adopted in applying its provisions, obtained in Pennsylvania, not by force of the statute, but as part of the common law. *Witman v. Lex.* 17 S. & R. 88-90.

Upon such and much more powerful arguments, Sugden, in the case of *The Incorporated Society v. Richards*, 1 Dr. & W. 294; in Ireland, where the statute of Elizabeth is no more in force than it is in Maryland and Virginia, and where, consequently, the bequest must either be void or valid by some other law, held the jurisdiction of chancery to decree and enforce indefinite charities; and that the statute only introduced a new and special, but not *exclusive* mode of enforcing trusts and uses previously valid; and Lord Redesdale in *Attorney-General v. Mayor of Dublin*, 1 Bligh R. 312, 346, 347, held that the statute created only a new jurisdiction, by analogy to certain old writs—a jurisdiction ancillary to the court of chancery; and similar doctrines were maintained in *Zane's will case*, Bright. R. 346, till finally, on the fullest investigation, and on the faith of new lights making plain a path over which their predecessors had groped in darkness, and not unfrequently stumbled, the supreme court proclaimed the same doctrine in so convincing a form, as to silence controversy; in a scientific point of view, however, doubts may still invest its practical application in particular cases.

If this be so, it seems to be immaterial that the court of appeals of Maryland, following in the footsteps of Baptist

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*Association v. Hart's Executors*, 4 Wheat. 1, have said the Stat. of Eliz. is not in force in Maryland. We concede it, but ask relief of the courts of equity of the United States, administering the general equity jurisprudence of the common law, as expounded by the supreme court. If the question were whether the Stat. 43 Eliz. is in force in Maryland, the case of *Dashiell v. Attorney-General* might well be relied on as a conclusive adjudication upon the local statute law of the state. So far as it decides that, we do not impeach it; we say only, that its error in supposing that the whole law of charitable bequests of an indefinite character sprang from, and fell with, that statute, shall not bind the courts of the United States in deciding a question, under the common law, of general equity jurisprudence, and our protest rests on the reiterated decisions of the supreme court. That such was the only point decided in 5 Har. & Johns., appears from the very opening of the opinion on p. 398, where it is held, that the peculiar law of charities originated in the Stat. 43 Eliz., and that, independently of it, equity could not, in its ordinary jurisdiction, sustain a bequest which, if not a charity, would, on general principles, be void. Then the vagueness of the particular bequest is discussed, and finally, it is shown that the Stat. 43 Eliz. is not in force in Maryland. Now we concede, as a point of local law, that 43 Eliz. is not in force in Maryland; we controvert the opinion that the courts of equity had no general jurisdiction over indefinite charitable bequests; and as a point of general equity jurisprudence, the circuit court is not bound by the court of appeals of Maryland.

The question then, relates, not to a local statute, nor to a rule of law of title to real property, nor even to the meaning and effect and construction of the language of the will; but simply to the powers of a court of equity to enforce what is confessed to have been the intention of the testator. Neither is it a question as to whether the powers

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of the Maryland court of chancery are adequate to the enforcement, for they may be entirely inadequate, or such courts may not exist at all in Maryland, as they do not in Louisiana, or Massachusetts or Pennsylvania; but can the United States circuit court enforce this trust, no local statute declaring it void in itself; and if it fall at all, it being for want of competent power to enforce it.

Now it is obvious that the powers of the circuit court cannot depend either upon the equity powers conferred by the state upon its courts of equity, or upon the decision of those courts upon their powers. And though they may decide, and profess to rest their decision upon general equity law, yet that would not bind the circuit court's decision as to its powers on the same question. For example, suppose it should decide that a legacy to the family of A., was too vague; or that a trust declared in a will was void, if no trustee were named; or that a court of equity had no power to substitute a surety to the right of the creditor secured; or that equity had no power to relieve against a mistake of fact; nobody would suppose the circuit court bound. On the contrary, the supreme court has declared that the judiciary act confers the same chancery powers on all, and gives the same rules of decision in all the states, whether courts of equity exist there or not; *United States v. Howland*, 4 Wheat. 108; and by parity of reasoning, whatever limit, whether by legislation or judicial construction, may have been set to their powers. And in *Robinson v. Campbell*, 3 Wheat. 212, it was the opinion of the court, that their equity jurisdiction and powers were not confined to the modes and extent of administering relief possessed by the local tribunals; for in some states no courts of equity exist, and in others equitable rights are considered nullities, and no relief given for their violation; so that the United States courts would not have the same powers in all the states; and therefore, they must look to the common source of our law (England) for the powers of courts of common law

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and equity. In *Livingston v. Story*, 9 Pet. 633, 654, 655, 656, 657, the above cases are affirmed, and the principle reiterated, that the courts of the United States may recognise and enforce equitable rights and remedies, even where they are not recognised in the laws or local tribunals of the state.

In the case of *Swift v. Tyson*, 16 Pet. 1, 18, 19, the supreme court decided that the decisions of the local tribunals on contracts and instruments of a commercial nature (not on local statutes or land titles) did not furnish positive rules or conclusive authority to bind the judgment of the supreme court; that their interpretation and effect must be sought, not in the decisions of local tribunals, but in the general principles of commercial law, and this in a case upon a New York acceptance. So also in the case of *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 511, 512, the court said, the questions were of the general commercial law depending on a construction of the contract of insurance, not local in its character, and that on such a question, the decisions of the state courts could not conclude them, however much they might regret the arrival at results varying from those of the state courts; similar principles are affirmed in the case of *Gaines v. Chew*, 2 How. 650. In the case of *Swift v. Tyson*, the court draws the distinction between laws and mere judicial decisions, often re-examined, reversed, and qualified by the same courts; mere evidence of the laws, and so liable to be rebutted by further and better evidence; of which no better illustration can be imagined than the law of charitable uses—first repudiated as no part of equity jurisprudence in *Baptist Association v. Hart*, because supposed to have originated from the Stat. 43 Eliz., then on recent investigations, re-adopted and re-instated in its place as an integral portion of that jurisprudence. And the court further distinguishes decisions on statutes, and relative to rights and things having a permanent locality, and other

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things immovable and intra-territorial in their nature and character (by which they confess themselves bound) from decisions on the general doctrines of the common law, whether administered in a legal or equitable forum; of the latter character is *Dashiell v. Att'y-Gen'l*, 5 H. & J. And in the case of *Flagg v. Mann*, 2 Sumn. 487-544, Story has expressly held that the courts of the United States are not bound by the decisions of a state court on a matter of general equity jurisprudence.

That this bequest is not too vague under the law of charitable uses, and that it is charitable in its nature, and may be executed by the courts of equity under their general powers, we refer to *Witman v. Lex*, 17 S. & R. 88; *West v. Knight*, Cas. in Chancery 134; *Simon v. Barber*, 5 Russ. 112; *Hayter v. Trego*, 5 Russ. 113; *Widmore v. Woodroffe*, Amb. 639; *Wellbeloved v. Jones*, 1 Sim. & Stu. 40; *Society for Propagation of the Gospel v. Attorney-General*, 3 Russ. 142; *Foley v. Wontner*, 2 Jac. & Walk. 245; *Miligan v. Mitchell*, 3 Mylne & Craig 72, 84; 1 Dow 1; 2 Bligh 529; 3 Meriv. 353, 418. Indeed, the case of the *Baptist Association v. Hart's Executors*, 4 Wheaton 1, would of itself be sufficient on this point, for the complainants there failed only because the court thought the law of charitable uses arose from and depended on the Stat. 43 Eliz., but it is plain that the court considered the bequest perfectly valid under the law of *charitable uses*, and would have sustained it had they considered that law a part of general equity jurisprudence at common law.

Upon what part of the case in 2 Howard the counsel for the defendant bases his statement, that the supreme court refers to and adopts the principle of the case in 4 Wheaton as applicable, where the Stat. of Eliz. is not in force, we are entirely unable to surmise. In reply to the authority of 4 Wheat. the court distinguish it from the one at bar, 1st, as arising in Virginia, where 43 Eliz. was repealed; and 2d, as being the case of an unincorporated

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association, an answer quite sufficient to withdraw the case at bar from the influence of 4 Wheaton. But the court does not stop with that distinction between the cases, but proceeded to show the law to be other than it had been decided to be in 4 Wheaton, and to adopt and affirm the law of charitable uses as a part of the common law of equity jurisprudence. And it was because the bequests of the will were within this general law that the court supported them.

That such bequests have frequently been held valid in the courts of the states, independently of the statute of Elizabeth, and under the common law, and that these bequests in manner and form fall within those which have been sustained as sufficiently definite, will appear from the following cases: *Att'y-Gen. v. Dashiell*, decided in 1822, following close upon, and undoubtedly the result of the *Baptist Association v. Hart's Ex'rs*, in 1819; since then, we have *Witman v. Lex*, 17 S. & R. in 1827, and the *Ex'rs of Burr v. Smith*, 7 Vermont 241, in which case, among many charitable legacies to persons not competent to take except under the law of charitable uses, all held valid, was one to the treasurer for the time being of the American Home Missionary Society, formed in New York in 1826. Notwithstanding a misnomer and error as to the organization of the society, the bequest was sustained, and the whole question of the relation of the law of charitable uses to the statute of Elizabeth was investigated with the greatest learning.

The same is the case in *Wright v. Trustees of Methodist Episcopal Church*, 1 Hoffman 204-238. One bequest was to the Methodist society that meet in the meeting house in John street; the corporate style was, the Trustees of the Corporation of the Methodist Episcopal Church of the city of New York; and the corporation consisted of eleven congregations, having separate organizations, but not constituting separate parts of the corporate body. This was nevertheless held good, and that the money

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could be well paid, either to the clerk of this congregation, or to the general secretary or treasurer of the corporation. There was another bequest in the same will to the "Yearly Meeting of Friends in New York." It was a voluntary association, whose members resided in New York, Vermont, Massachusetts and Upper Canada, and yet the bequest was sustained. The opinion is one of the most elaborate on the subject of the independence of the law of charitable uses of the statute of Elizabeth, and its common law origin, p. 239-265. A similar decision was made, in the *Dutch Church v. Mott*, 7 Paige 77. The case in 1 Hoffman was decided in 1839; that in 7 Paige, in 1838; that in 7 Vermont, in 1835. The case of *Moore's Heirs v. Moore's Devisees*, 4 Dana 354, decided in 1836, is fully up to the same point. We likewise refer to the case of *Well-beloved v. Jones*, 1 Sim. & Stu. 40, for a case illustrating the circumstances under which the court refer it to a master to settle the safe and proper mode of disposing of the fund, where voluntary associations are interested, in certain circumstances.

II. The bill of rights is further evoked to avoid the legacy. Its 34th article is aimed, not at charitable donations generally, or even exclusively, but embraces *all* legacies, and only such legacies of goods and chattels as are given to the persons or the bodies designated. It avoids legacies for one particular class of charitable objects; but from this negative on *one* class of charitable donations, which would not have been forbidden, had they not previously been allowable and legal, arises a strong inference of the general validity of donations to general and indefinite, and unincorporated objects and purposes. Why avoid a legacy to a minister as such, to be taken in succession, if they were not previously valid? And how were such valid, save under the law of charitable donations? Does not the avoidance of all gifts to religious congregations, except land for a church, &c., admit their previous capacity, as such congregations, to take such gifts generally?

Of which general capacity the above exception still remains. But this only in passing to the construction of the article.

The portion relied on is, we presume, that which avoids "any devise of goods or chattels for the support, use or benefit of any minister, public teacher or preacher of the gospel, or for any religious sect, order or denomination." Certainly, this legacy does not fall within the language descriptive of either of the two classes of proscribed objects. It is not to a minister, public teacher or preacher of the gospel. It is to the Education Society, not composed of clerical persons according to its constitution, but of all classes and denominations who conform to its constitution; the legacy is for the benefit of students at the Theological Seminary of Virginia. But students of theology are neither ministers, public teachers nor preachers of the gospel; they may become such, and so may any lawyer or scholar; and they may never become such, though they may study the science of theology. The bequest, in its very terms, excludes any benefit to any minister, teacher or preacher, and confers it solely on persons not clerical, studying a particular science at a particular institution of learning. On the principle which alone can bring this legacy under those terms, every legacy to any institution of learning, for the foundation of scholarships, wherein theology shall be taught, must be void; that is, any bequest for the benefit of any university, in the German, or English, or indeed, the American sense of that phrase. There is no abnegation whatever upon the students ever to become ministers.

Neither does this legacy seem to fall within the terms, for the benefit, use or support of any religious sect, order or denomination. Certainly, in no strict sense of the terms, is the Education Society, as described in the bill, either a religious sect, order or denomination; it is an education society, not a religious society; it may, or may not, be composed of religious persons; its objects are not religious



worship, but the education of certain persons in one branch of moral science. An incidental advantage may result to one religious denomination, but if the gift be not for the use of that denomination, as such, it seems not to be within the intent of the article; it may derive an incidental advantage from the establishment of any institution of learning where persons might be aided in studying theology; for persons might there be aided who afterwards enter the Protestant Episcopal Church. A bequest to St. John's College might be void on the same ground. The words, religious sect, order or denomination, have a well understood meaning, which will not embrace the Education Society; they mean a number of persons united in a particular organization called a church, for the purposes of common religious worship; but surely a set of gentlemen forming a society for aiding youth in their theological education, could hardly be called a religious sect, order or denomination. *Runkel v. Winemiller*, 4 H. & McH. 452.

But in fact, whatever may have been the meaning of the article, has it not been virtually repealed and annulled by subsequent legislation? The act of 1798, ch. 24, incorporating the Vestrymen of the Protestant Episcopal Church, expressly allows them to take bequests of goods and chattels, provided the income do not exceed a certain amount, sect. 28. The act of 1802, ch. 111, sect. 8, confers like power on the trustees of any religious congregation of any denomination, with a proviso against gifts, &c., not to take effect till after death, and limiting the amount to be held by any congregation. This restriction of gifts to take effect after death, was annulled by the act of 1815, ch. 222, sect. 1, and the power to take by will or deed made general and absolute. The act of 1814, ch. 58, conferred like capacity on the Methodist Baltimore Conference, though its jurisdiction extended beyond the state, into Pennsylvania on one side, and to the Rappahannock, in Virginia, on the other; for the benefit of all which region it is em-

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powered to hold property. These acts reflect a double light on this subject.

1. They show distinctly what was meant by religious *sect, order or denomination*; merely a congregation or single society, organized for purposes of common worship; not any multitude of persons who might happen to concur in one or more tenets of belief, still less any society, whatever might be the prevailing complexion of the religious opinions of its members, organized, not for the purposes of religious worship and improvement, but for the purpose of scientific instruction in matters of theology generally. This meaning appears from the preamble of the act of 1802. It speaks of petitions from religious societies and of all denominations of Christians, and their holding property in a congregational capacity, &c.

2. It is plain, that the bill of rights is entirely repealed in its principle and substance by these acts. The whole policy of the state is changed; it now sanctions what it before condemned. It forbade all bequests for the benefit of religious sects, and now all bequests for all sects are valid, if not beyond a certain sum. Upon what principle can this bequest be considered void under the article, when if in favor of any sect or denomination *as such*, it is in favor of those vested specially with power to take and hold property in Maryland? If the court should think this bequest ought to be confined to the benefit of certain of the Protestant Episcopal congregations of Maryland, it is competent for the court, in directing the execution of the trusts of the will, to limit the application in such manner, and to designate the mode of applying the fund: *i. e.*, that it should be applied to the education of ministers for the church in Maryland, on a scheme to be reported by the master for that purpose.

Should the court not take that view, it may be worth while to consider, if the article extends to bequests to ministers or religious denominations beyond the state of Maryland, as this society is beyond the state. The same reasons

would not apply to prohibiting bequests to foreign as to domestic associations; and we know that money bequeathed in England to be laid out in land in a foreign country, for charitable purposes, will be sustained, when if it be to be laid out in England, it would have been void. Whether the analogies of these cases touch the present is submitted, with a simple reference to 2 Story's Eq. § 1184, 1185, &c.

If this bequest should be considered such in its character as the bill of rights describes, and so void, if the persons to take were in Maryland, it is not unfair to argue, that the article only contemplates gifts to such persons, or to such purposes, within the state; but never had any application to such persons, or associations or objects, beyond the state, since the state policy could in no manner be affected by the growth of such associations, or the accumulation of wealth in the hands of ministers beyond the state.

*J. M. Campbell*, in reply:—The defendants' counsel in support of the demurrer in this cause, and in reply to the counsel for the complainants, deems it unnecessary to advert to a large part of their argument, and the bulk of their authorities, because, in his view, the question is disposed of by the cases already cited by him, in the supreme court, and in the state of Maryland.

It is conceded by the complainants' counsel, that the statute is not in force in Maryland, and that under the decisions of the Court of Appeals of Maryland, the legacy now sued for would not be recoverable there, or at any rate, such is the fair conclusion from what they say. Now, do the courts of the United States, in deciding questions of charities and charitable uses, cut loose from the law settled in the states where those courts sit? The case of the Trustees of the Baptist Association *v. Hart's Exr's*, in 4 Wheaton, has already been cited by us. Of that case, the supreme court, in *Vidal v. Girard*, 2 How. 192, say, it "arose under the law of Virginia, in which state the Stat.

43 Eliz., ch. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to support the bequest." No objection is taken to the decision, upon the ground that the law of Virginia had nothing to do with the question, but on the contrary, the assumption is, that the court in Hart's case decided rightly as far as that ground went, though possibly they might have erred on the ground that there was no jurisdiction of charities independently of the statute.

This view becomes still more clear on an examination of the case of *Vidal v. Girard*. That case having come up from the Pennsylvania circuit, care is taken, on pages 192 and 196 of the opinion of the court, to affirm and repeat with emphasis the fact, that though the Stat. 43 Eliz. is not in force in Pennsylvania, its principles are, "by common usage and universal recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." And on page 197, the opinion goes on to state, that "the case is completely closed by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania." It seems to us that, upon the principles laid down by the complainants' counsel, it was quite unnecessary for the court to have examined at all into the laws of Pennsylvania, and the fact that it has done so, coupled with its observation as to the different law prevailing in the circuit where Hart's case was decided, shows that the United States courts, whatever they may do in other cases, do not mean to get up a different law of charitable uses from that recognised by the states in which they sit. Nor would it be proper. Upon general principles of law, commercial or otherwise, in which a state can have no interest different from that of the rest of the world, or Union, the federal courts may decide according to state decisions which break in upon the uniformity of a general system; but they never have so decided, where the effect was to uproot a particular line of policy adopted by the

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state; and such is the case of the doctrine of charitable uses. If a state sets its face against particular charities, the courts of the United States will never consent to plant them in its borders.

The opinion of the court was delivered by—

TANEY, C. J. This case has been submitted on written arguments. The money in question is bequeathed to "The Education Society of Virginia, for the benefit of the theological students, at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia; and the demurrer admits that the complainants represent the society to whom this bequest was intended to be made. The society is not incorporated, and the bequest is to a voluntary association of individuals to take in succession.

The court is of opinion that this case must be governed by the cases of *Dashiell v. Attorney-General*, 5 Har. & Johns. 392, and 6 Har. & Johns. 1, decided in the Maryland Court of Appeals; and consequently, that this bequest is void. The principles decided in these two cases were also ruled by the supreme court, in a case arising in Virginia, in which state, as in this, the statute of Elizabeth concerning charitable uses has not been adopted, nor its principles recognised, as a part of the common law of the state. *Baptist Association v. Hart's Executors*, 4 Wheat 1. The case of *Vidal v. The Girard College*, was decided altogether upon the law of Pennsylvania. 2 How. 192.

It is very true, that in the last-mentioned case, the supreme court express the opinion that the courts of chancery in England possessed the power of enforcing charities of this description, before the statute of Elizabeth was passed; in other words, that such a devise was good, and might be enforced in chancery. But assuming this to be correct, and that the court were mistaken in the contrary opinion expressed in the case of the *Baptist Association v. Hart's Executors*, yet it does not follow, that because such a bequest would be maintained in England, it must also be

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maintained in Maryland. Nor is such the doctrine of the supreme court in the case of the Girard College; on the contrary, while the court in that case held that such a devise was valid in Pennsylvania, it still recognised as authority the case of the Baptist Association *v. Hart's Executors*, which decided that a similar devise was void in Virginia. The statute of Elizabeth is not in force in either of these states, and the supreme court founded its decision in the last of these cases, upon the common law of the state, as recognised in Pennsylvania, by universal usage and judicial decision. Upon the same principle, this case must be decided upon the doctrines of the Maryland law, as recognised and established by judicial decisions; and the two cases in the Court of Appeals before mentioned are conclusive against the validity of the bequest in question.

The circuit courts of the United States administer the laws of the states in which they sit, unless those laws are in conflict with the constitution of the United States, treaties or acts of congress; and as a general rule, regard the decisions of the highest judicial tribunals of the state as conclusive evidence of the law. We do not speak of matters of practice, or of the forms of proceeding; but of decisions upon the right or claim in dispute between the parties, where that right depends upon the laws of the particular state.

The cases of *Swift v. Tyson*, 16 Pet. 1, and *Carpenter v. The Providence Insurance Co.*, 16 Pet. 511, 512, were cases depending upon the usage of commerce, and the general principles of commercial law. And the supreme court have always said that in cases of that description, where the state court does not decide the case upon any particular law of the state, or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive evidence of the commercial law of the state, and will not be followed as such by the supreme court. And the reason of this distinction is obvious. The state court does not

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decide in such cases upon the peculiar laws and institutions of the state. Its decision, therefore, is no evidence that any law has been adopted by the state in conflict with the general principles which regulate commercial contracts throughout the commercial world.

So too, as relates to the jurisdiction of the circuit court sitting as a court of chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States, is, under the constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognised in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the remedy and not the right; and it does not follow, that every right given by the English law, and which, at the time the constitution was adopted, might have been enforced in the court of chancery, can also be enforced in a court of the United States; the right must be given by the law of the state, or of the United States. It is the form of remedy for which the constitution provides; and if a complainant has no right, the circuit court, sitting as a court of chancery, has nothing to remedy in any form of proceeding.

In the case before the court, the question is: is the bequest which the complainants claim, a valid one by the laws of Maryland? It is a question which, in its nature, necessarily depends upon the laws of the respective states. Some of the states sanction devises of this description; some do not; and undoubtedly, it depends upon every state to determine for itself, to whom and in what form, and by what instrument, any property within its borders may pass by devise or otherwise. The Court of Appeals in Maryland have decided, that a bequest like this is void by the laws of the state, and passes no right to any one. This court is bound to respect this as the law of the state; and

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if there is no right vested in the complainants by this bequest, this court cannot create one. There is, therefore, neither an equitable nor legal title, upon which the powers of a court of the United States can be called into action, either as a court of equity or of law, in behalf of these complainants.

This is not a proceeding to appoint a trustee to execute a valid trust; nor indeed, are there any *cestuis que trust*. This doctrine is fully maintained in the case of *Wheeler v. Smith*, 9 How. 55, which was decided at the last term of the supreme court. The cases of the Baptist Association v. Hart's Ex'rs, and *Vidal v. The Girard College*, were in that case recognised as depending upon the laws of the respective states, and not merely upon the doctrines of the English chancery. The bill in this case must, therefore, be dismissed with costs.

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CHAS. C. WARTMAN, by his next friend, JOHN C. BULLIT,

vs.

MICHAEL K. WARTMAN.

On a bill, filed in January 1852, praying that certain money held in trust by the defendant might be ordered to be brought into court, the defendant answered, admitting that he had the money in his hands, but resisting the claim to it set up by the complainant: on the 2d of November 1852, some months after the defendant had answered the bill, a petition was filed by the complainant, asking that the money might be brought into court, and on this petition, an order was passed, directing the defendant to pay the money into court, or show cause for not doing so: the defendant did not obey the order, and excused his so doing, on the ground that the complainant was not entitled to the money, and that he had paid it away to the persons who were entitled: thereupon, " peremptory order was passed, requiring him to bring the money into court, but in indulgence to him, a proviso was annexed, that a bond with security should be deemed a compliance with the order: this order was also disobeyed by the defendant, and his answer was put in, assigning the same reason as before for refusing to comply with it: *Held*, that the defendant was guilty of con-



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tempt in parting with the fund, whilst the question as to its disposition was pending before the court.

The assertion of want of title in the complainant, was a question to be decided upon the final hearing; the only question upon the order was, as to the safety of the trust fund, pending the litigation, so that it might be forthcoming when the rights of the parties were finally decided.

As to the request, in the answer to the second petition, that the order be suspended till the final hearing, it was nothing more nor less than an application to the court to abandon the measures it had taken to secure the fund, because the defendant had determined not to comply with its orders.

The defendant, being in contempt for disobedience to the authority of the court, was not entitled to be heard on any motion, nor authorized to take testimony, or to proceed in any other manner, until he purged himself of the contempt.

After arrest and commitment, it was not admissible for the party to apply to have the attachment set aside, and the question of his commitment heard, on the ground that his non-compliance with the order of the court arose from his inability so to do, and not from an intention to contemn the court's authority; that he had been informed by his counsel that nothing would be done with the attachment, till the following term, when the whole case would be settled; and that he had been busy since, in procuring testimony, in order to prepare the case for a final hearing, and to show that the complainant had no right to the fund.

Before the attachment was issued, opportunity had been given him to show cause against it, and if any such cause existed, then was the time to show it.

The question whether a contempt has or has not been committed, does not depend on the intention of the party, but on the act done.

Contempt is a conclusion of law from the act; and disobedience to the legitimate authority of the court is, by law, a contempt, unless the party can show sufficient cause to excuse it.

If the defendant was not able, at the time he distributed the trust fund, to replace it, in case the court should order it to be brought in, or should finally decree in favor of the complainant, the distribution he made was not only in contempt of the authority of the court, but a fraudulent attempt to defeat the just rights of the complainant, if the decision should be ultimately in his favor.

If the matter were postponed till the time of the final hearing, it would not alter the case, as the question then to be first decided would still be upon the orders for the security of the fund; and there could be no final hearing till they were disposed of.

If he were now actually an insolvent debtor, and his property transferred to a trustee, appointed by the proper legal tribunal, this court would dis-

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charge him from the committment for contempt, because he would be obliged, with his petition, to return a schedule of all his property ; and the fact that it was all conveyed to the insolvent trustee, would show, that it was no longer in his power to pay the money into court, or give the security required for its forthcoming, if the final decision should be against him.

Circuit Court, April Term, 1853. In Equity.

The defendant in this case was attached for contempt of court, in disobeying an order requiring him to bring into court, or give security for the forthcoming of, a sum of money, admitted, by his answer to a bill in equity, to be in his hands. On his application to be discharged from the attachment, the following opinion was delivered by—

TANEY, C. J. In the case of Charles C. Wartman *v.* Michael K. Wartman, an application has been made to the court to discharge the respondent from the attachment heretofore issued against him, for a contempt in disobeying the order of the court, upon which attachment he is now imprisoned.

In deciding upon this application, it is necessary to review the proceedings prior to the attachment, and more especially, the orders of the court and the answers made to them by the defendant, which finally led to his commitment for a contempt.

It appears that Abraham Wartman, the father of the present defendant, devised to him a large sum of money, in trust for John K. Wartman (another son of the said Abraham), during his lifetime, and after his death, in trust for such child or children as the said John K. Wartman might thereafter have ; and in default of such issue, the said fund was to be equally divided between the children of the testator. The will directed that the fund should be invested by his executors, during the lifetime of John K. Wartman, in stock or some other productive securities. This is the substance of the will and codicil of Abraham

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Wartman, so far as it is material to state their provisions in deciding the question now before the court.

John K. Wartman, for whose benefit the trust was created by his father, is since dead; and the complainant, who is an infant, filed his bill, by his next friend, in which he alleges that he is the only child of John K. Wartman, and as such, entitled to the whole of this trust property, under the will of his grandfather, Abraham Wartman; and praying that Michael K. Wartman may be compelled to render an account of the amount in his hands, and to pay it over to the complainant. The bill also alleges that the money is unsafe in the hands of the defendant, and prays that the same may be brought into court, and invested in some safe and productive security, under the authority of this court.

The bill was filed on the 5th of January 1852, and the defendant answered on the 20th of April following. He admits that he had, at that time, in his hands, in cash, \$7544 83 of the trust fund created for the benefit of John K. Wartman; he admits that he had refused to account for it with the complainant or his agents, or to pay it over to him, because, as he avers, the complainant is not the child of John K. Wartman; he also avers that the said John K. Wartman died without leaving any issue, and that the trust fund belongs to the children of the testator, of whom the defendant is one.

The district judge, having been counsel in the case, and the Chief Justice, being necessarily absent during the whole of the April Term, 1852, attending the supreme court, no order could be taken at that term, upon the application in the bill for an order to bring the money into court; and the case was continued to the next term, the parties, by consent, issuing a commission to take testimony, in order to prepare the case for final hearing. At the beginning of the next term, that is, on the 2d of November 1852, the complainant filed his petition, again averring that the trust fund was

insecure, and praying that the defendant might be ordered to bring the money into court, to be invested, under the direction of the court, in some productive security, to await the final decision of the controversy then pending between the parties. Upon this petition, the court passed the usual order in such cases, directing the defendant to bring the money into court, on the 24th of that month, or to show cause to the contrary.

The defendant did not bring the money into court, and assigned as his reason for not doing so, that the complainant was not the son of John K. Wartman, and had no interest in the trust fund, and that the defendant had, therefore, felt it to be his duty to distribute it among the persons who were entitled to it, upon the death of John K. Wartman without children, and having thus disposed of it, he had no longer any trust funds in his hands.

Now, whether the complainant was or was not the child of John K. Wartman, is a question for the court to decide, upon the final hearing of the cause, and not for the defendant; it is the very matter in issue. The defendant admitted that the trust fund was in his hands, when he filed his answer to the bill, and he knew that the application made in the bill, for an order upon him to bring the money into court, upon the ground that it was insecure in his hands, was pending before the court and awaiting its decision. And he now offers as a justification for his refusal to pay it into court, that, in his judgment, the complainant was not entitled to it, and that he had, therefore, paid it to those whom he considered entitled, regardless of any order the court might pass for the security of the fund, pending the controversy. In other words, that he had decided the matter in dispute for himself, and had determined to evade and defeat any order the court might make for the security of the fund, by paying it over to others, and thus putting it out of the reach of the process of the court.

The answer has, at least, the merit of frankness; but the avowal of the contempt he had committed, in parting with this trust fund, while the question as to its disposition was pending before the court, can hardly be received as a justification for his refusal to replace the money.

After such an answer, a peremptory order to bring the money into court, was a matter of course; but as it was possible, that the party might have acted under some error of judgment, and might be subjected to some inconvenience, by being compelled to replace the trust fund, and as the only object of the court was to place it in a state of safety, until the decision of the question in issue between the parties, a proviso was annexed to the order, by which it was directed that a bond, with security for the forthcoming of the money, provided the decision was finally in favor of the complainant, should be received as a compliance with the order to bring the money into court. It left it, therefore, optional with the defendant, to pay the money into court, or to give security for its forthcoming. The order was issued on the 3d of December 1852, and the defendant directed to comply with it on or before the first day of January following.

This order was also disobeyed, and an answer put in reiterating the same things that he had stated in answer to the former order, and assigning the same reason for refusing to comply with it. There is one fact, however, stated in it, which did not appear in his former answer, that is, that in the distribution he made of the trust fund, he retained in his hands the one-third of it (upwards of \$2000), as his own share, and now declines bringing it into court, because he had appropriated it to his own use. He takes no notice whatever of the alternative which the order permitted, of giving security that the trust fund should be forthcoming to abide the final decision of the court; he does not allege that he is unable to give the security, and assigns no other reason for his disobedience of the whole order, but his

belief that the complainant is not the son of John K. Wartman, and therefore, not entitled to the fund.

As regards his assertion in this answer that the complainant is not the son of John K. Wartman, it is altogether irrelevant to the matter in hand and out of place; that question is to be decided on final hearing. The only question upon the order was, as to the safety of the trust fund, pending the controversy, so that it might be forthcoming when the rights of the parties were finally decided by the court. And as to the request contained in this answer, that the order be suspended until the final hearing, it is nothing more nor less than an application to the court, to abandon the measures it had taken to secure the fund, because the defendant had determined not to comply with its orders, and to condemn its authority.

It is, moreover, proper to remark, that the defendant, being in contempt for disobedience to the authority of the court, is not entitled to be heard on any motion, nor authorized to take testimony, or to proceed in any other manner, until he purges himself of the contempt. This is the well-settled principle of chancery law, and it would be impossible for the court to enforce its just authority upon any other principle.

The Chief Justice being at Washington, attending the supreme court, no order could be taken on this answer until he returned to Baltimore. Immediately upon his return, the complainant applied for an attachment against the defendant, to compel his obedience; and the court being unwilling to proceed to extreme measures, without giving the defendant every opportunity of purging himself of the contempt which he had openly committed and avowed, it directed notice of the motion to be given to his counsel, that he might show cause, if any he had, why the attachment should not issue. His counsel appeared and was fully heard; his objections consisted in an application for delay until the final hearing, and an objection to the want of the

proper averments of citizenship in the bill so as to give jurisdiction to the court. As relates to the application to abandon the order, it was altogether inadmissible, for the reasons already stated; and as to the defect in the bill, it appeared, upon examining the papers in the case, that it had long before been amended, by consent of counsel, and the amendment had no doubt escaped the recollection of the counsel for the defendant, when the objection was taken.

In this state of the case, nothing remained for the court, but to surrender its authority over this trust, or enforce obedience by an attachment; and an attachment was accordingly ordered, upon which the defendant was arrested, and committed to prison in obedience to the writ.

Since his arrest and commitment to prison by the marshal, he filed in court an application, stating that his non-compliance with the order to bring the money into court, or to give security, arose from his inability to do either, and not from any intent to contemn the process of the court; that he had been informed by his counsel, that nothing would be done until the April Term, when the whole case would be settled; and that he had been busy since in procuring testimony, in order to prepare the case for a final hearing, and to show that the complainant had no right to the fund. He denies that he was wilfully guilty of any contempt of the court. Upon this affidavit, an application has been made in his behalf, to set aside the attachment, upon the ground that the affidavit purges him of the contempt, and that he has not had an opportunity of being heard on that subject.

As relates to the suggestion in this application, that the party has not had an opportunity of being heard, to show cause against his commitment on this attachment, it is a mistake as to the fact; as has been already said, notice of the motion for the attachment was given to his counsel, who appeared and was fully heard; and this opportunity of being heard before the attachment issued, was given by

the court, because it was more favorable to the defendant, and would save him from arrest, if he had any sufficient cause to show against it; and if any such cause existed, then was the time to have shown it.

As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done. It is a conclusion of law from the act; disobedience to the legitimate authority of the court, is, by law, a contempt, unless the party can show sufficient cause to excuse it.

As regards the acts of the party in this respect, they have been already stated. After he had been brought into court to answer for a trust fund, which he admits to be in his hands, in cash, when he answered, and while an application was pending to order the fund to be brought into court, because it was insecure in his hands, he says that he appropriated one-third of it to his own use, and paid the remaining two-thirds to others, and then sets up this open defiance of the authority of the court, as an excuse for his conduct. And as regards this defence, such as it is, he does not offer the slightest evidence to support his averment, that he had ever paid away two-thirds of this fund to any one, nor does he, in his answer, undertake to say when it was paid; for ought that appears, if the payment was ever made, it may have been done after the order was served upon him, and made for the very purpose of setting up that defence.

So too, as regards the security for the trust fund; he does not say that he was unable to have given it, either before he filed his answer, or when he distributed the trust fund. And if he was not able, at the time he distributed it, to replace it, in case the court should order it to be brought into court, or should finally decree in favor of the complainant, the distribution he made was, not only in contempt of the authority of the court, but a fraudulent attempt to defeat the just rights of the infant complainant, if the decision should be



ultimately in his favor. But he does not say in his affidavit that he was unable to have given the security, when he paid away or appropriated the trust fund. And if he was able then, why is he unable now? He states no losses of property or money since that time; he does not say that the large portion of the fund which he retained for himself, has been lost, but merely that he appropriated it to his own use. If he purchased property with it, what has become of that property? Moreover, he did not, in his answer of the first of January, say he was unable to give the security, although that was an alternative presented by the order; he evaded that part of the order, and passed over it without offering any excuse for not complying with it; nor was any difficulty on that score suggested when his counsel was heard in opposition to the attachment. It is for the first time put forward in his affidavit, filed on the 26th of March, after he was in actual custody under the attachment. Such an excuse comes, at this late hour, under very suspicious circumstances, when he presents with it no schedule of his property, shows no losses since he paid away two-thirds of the trust fund, and does not even now offer to account for the one-third, which he retained in his own hands and appropriated to his own use.

As to the application again repeated in this affidavit, to abandon the proceedings to secure the trust fund, and proceed to the final hearing of the case, the court has already expressed its opinion upon a former similar application; and this constant reiteration tends only to confirm that opinion. He says that he was informed by his counsel, after his answer to the peremptory order to bring the money into court, or to give security for its forthcoming, that there would be no further proceedings until the meeting of the court on the first Monday in April. But he does not show that he was put to any disadvantage or inconvenience by this mistake of his counsel. He was not prepared, it seems, to pay the money or give the

security on that day, nor has he yet tendered either, and if there had been no further proceedings until the meeting of the court, the question would then still have been precisely the same that it is now, and was when the attachment was applied for. The question to be first decided would still have been, upon the orders for the security of the fund; and there can be no final hearing, until they are disposed of. He states also, that a commission had issued, with the consent of the complainant, to take testimony and prepare the case for final hearing at the April Term; but the court do not see how this circumstance affects the question. If the complainant withdraws his application for process to secure the trust fund, that indeed would alter the case; but he has not done so. And the court would be forgetful of its duty, and surrender its whole power over trustees and trust property, if it failed to enforce its orders for the security of a trust fund, admitted to be in the hands of the trustee, when he answered, and deemed to be unsafe in his possession; for a final decree would be idle and nugatory, if, pending the litigation, a fraudulent trustee was left at liberty to waste or misapply the trust property, or place it beyond the reach of the process of the court. Certainly, this case, as it now stands, is not one in which the court would be disposed to depart from the ordinary course of chancery proceeding; for upon comparing the various answers and affidavits of the defendant, the conclusion seems to be irresistible, that this fund was partially paid away, and the residue applied to the defendant's own use, not only in contempt of the authority of the court, but for the purpose of defrauding the infant complainant of his just rights, if the decision of the court should be ultimately in his favor.

The defendant cannot exonerate himself from this imputation except in one of two ways. First. By showing by satisfactory proof, at what time two-thirds of this fund was paid away, and the other third appropriated to his own

*Wartman v. Wartman.*

use and how appropriated; and that at the time of this payment and appropriation, he had sufficient means to replace it, if the decision of the court was against him, and if he had sufficient means at that time, how it has happened that he is not able to pay the money or secure the fund. Or, secondly. That he is now actually an insolvent debtor, and all of his property transferred to a trustee appointed by the proper legal tribunal, for the use of his creditors.

Until one of these two things is done the attachment will not be set aside, and he must still stand committed.

*W. B. Prime*, for complainant.

*D. & J. Stewart* and *Wm. H. Norris*, for defendant.

*Note to the Opinion.*—I find from the argument of counsel, that the ground upon which the release of the party by the insolvent law, would be sufficient to discharge him from the commitment for contempt, has been misunderstood, and I, therefore, add this note to the opinion, to prevent any mistake on this point. He would be released in case he took the benefit of the insolvent law, not because his person would thereby be discharged from imprisonment for debt, for that discharge exists under the constitution of the state independently of the insolvent law. But the court would discharge him from the commitment for contempt, because he would be obliged with his petition to return a schedule of his property; and the fact that it was all conveyed to the insolvent trustees, would show that it was no longer in his power to pay the money into court, or give the security required for its forthcoming, if the final decision should be against him.

## PEARSON CROSBY

*vs.*

A. P. LAPOURAILLE and WM. H. MAUGHLIN.

A combination in machinery is patentable, if the combination be new, although the elements which compose it may be old, provided it was invented by the patentee, and is not the mere effort of ordinary mechanical skill, putting together known powers and combinations to produce the result.

Circuit Court, November Term, 1854. In Equity.

The object of the bill filed in this case was, to restrain the defendants, by injunction, from an alleged infringement of a patent for a saw-mill. The case was submitted and argued upon bill and answer. The facts sufficiently appear from the opinion of the court.

TANEY, C. J. This case has been submitted for final hearing upon bill and answer and general replication. The object of the bill is, to enjoin the respondents, perpetually, from using a certain machine for sawing lumber, which is particularly described in the answer, upon the ground that the machine, as thus described and admitted to be used, is an infringement of a patent granted to the complainant for a machine of the like character. The patent, under which he claims, is exhibited with the bill. The oral argument in court, as well as the written arguments since presented, have been chiefly directed to the construction of the patent of the complainant, and the extent of the claim made in it. Upon this point, the court is of opinion:

1. That the patent is for a combination; and undoubtedly, it is patentable, if the combination is new, although the elements which compose it may be old, provided it was

*Crosby v. Lapouraille.*

invented by the complainant, and is not the mere effort of ordinary mechanical skill, putting together known powers and combinations to produce the result.

2. The patent of the complainant covers the saw, as described in his specification, in combination with the framework, and any saw hung and strained in a manner substantially the same; but it does not cover a combination in which a saw may be combined with the framework, and hung and strained in a manner substantially different from that described in his specification. In other words, it does not cover every combination in which a saw acts perpendicularly, and produces the prescribed result upon lumber pressed against it, in the manner set forth in the patent and specification. The saw used must be hung and strained substantially in the manner described, in order to be covered by the patent.

The second part of the claim, is for the particular manner of hanging and straining the saw by the combination of three stirrups at the end. This claim covers a saw of this description, although the other machinery combined with it may be entirely different from that described in the specification of the complainant.

The dispute in this case, however, is not upon the second branch of the claim, but upon the first branch. The complainant contends that his patent is infringed, if a saw hung and arranged in any manner for sawing timber, is used in combination with the machinery and framework described in the specification, upon the ground that a saw hung and strained in any manner, with this combination, is a violation of the patent. I have already said, that I do not think this proposition can be maintained, and that the patent is not infringed, unless the saw is hung and prepared for its work in a manner substantially the same with the mode of hanging and arranging it mentioned in the specification.

But there are two questions of fact to be decided, before the case can be disposed of. The saw used by the respondent.

*Crosby v. Lapouraille.*

ents is particularly described in their answer, and certainly does not appear to be hung in precisely the same manner with the complainant's; but it may or may not be substantially the same, with only an important variation. The testimony of experts may be necessary on this question.

So again, the answer denies that a combination, such as the complainant describes, with a saw hung in the manner of the respondents, would be a new and patentable invention. He avers that his saw is hung and works in the manner used in some mills, long before the plaintiff obtained his patent; and that in the framework, by which the timber is moved forward to the saw and presented to its action, he has done nothing more than adopted the machinery long known and used in Woodworth's planing-machine, and indeed known and used, as he avers, before the patent for that invention. And that no change is made in this machinery to adapt it to sawing timber, beyond such slight alterations as would suggest themselves to a mechanic of ordinary skill, who was acquainted with the planing-machines in which it was used. And therefore, if the machine and combination he uses is substantially the same with the combination for which the complainant has obtained a patent, that combination was not new, and not patentable.

Here then are two questions of fact to be decided, before a final decree can be passed:

1. Whether the combination used by the respondents, hanging and arranging the saw in the manner described in the answer, is substantially the same with the improvement patented by the complainant, and the construction placed upon the patent, by the court as above stated?

2. If it be substantially the same, and covered by the complainant's patent, as construed by the court, is this combination a new invention for sawing lumber into boards, or is it substantially the same with all combinations known and used before this patent was issued?

Crosby v. Lapouraille.

There are some admissions of fact made in the argument on both sides, but the court must act upon the case as presented by the pleadings; for there is no agreed statement of facts, nor any testimony in the case; and the court cannot decree upon admissions made *arguendo* by counsel.

The case is, therefore, continued by order of the court until the next term, when the court will direct issues to be tried by a jury, upon the two questions of fact above stated.

*Schley* and *Latrobe*, for complainant.

*Wm. H. Young*, for defendants.

The issues of fact were not tried by a jury, and at November Term 1856, the bill was dismissed with costs.





# CASES IN ADMIRALTY.

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ALEXANDER ARDREY

*vs.*

PETER A. KARTHAUS.

A vessel owned by the respondent, a citizen of the United States, was captured by a British cruiser, during the last war with Great Britain, near San Andres, in Spain, within a mile of the shore, and within the jurisdiction of Spain, with which nation the United States were then at peace: the owner put in a claim, under the Florida treaty, on the ground that Spain had not discharged her neutral obligations in this matter, and was bound, therefore, to make reparation for the injury sustained by him: he was allowed, on account of such claim, for the vessel and cargo, and for the outward freight, but the amount awarded and received fell far short of the amount found to be due: the libellant was mate of the vessel, at the time of the capture, and was detained as a prisoner of war, until exchanged, when he returned to the United States, after the lapse of more than a year from the time he had left, having earned no wages after he left the vessel. On a libel filed by him against the owner of the vessel, to recover his wages up to the time of his return to the United States: *Held,*

1. That where freight is earned, or damages recovered in lieu of it, the seamen are entitled to wages.
2. That the only exception to this rule is, the case of recovery against the underwriters.
3. That capture by a public enemy forms no such exception.
4. That wages were recoverable in this case only to the day of condemnation, and that no deduction should be made from them, on account of the insufficiency of the sum received by the owner to cover his whole loss.

Circuit Court, April Term, 1836. Appeal from the District Court, in Admiralty.

This was an appeal from the decree of the district court, upon a libel filed by Ardrey for wages, against Karthaus, the respondent.

## Ardrey v. Karthaus.

Ardrey shipped as a mate on board the schooner Baltimore, owned by Karthaus, who loaded her on his own account, and she sailed from Baltimore for Bordeaux, during the last war with Great Britain; being driven out of her course by the pursuit of enemies, she was finally captured by a British cruiser, on the voyage from San Andres, in Spain, within a mile of the shore, and within the jurisdiction of Spain, with which nation the United States were then at peace. She was carried into San Andres, and detained there a few days, and then carried to an English port, where she was condemned as prize, and the libellant, who had remained on board until her arrival in England, was detained as prisoner of war; after some considerable detention, he was exchanged and returned to the United States at least twelve months after he sailed, but as soon as he could, after his release by the enemy, and having earned no wages after he left this vessel.

Karthaus put in a claim under the Florida treaty, upon the ground, that Spain had not discharged her neutral obligations to the United States in this matter, and was therefore bound to make reparation for the injury sustained, and that this was among the wrongs provided for by that treaty. The commissioners decided in favor of the claim for vessel and cargo, and also including freight on the outward voyage, and the respondent received the amount awarded, but which, like all other awards under that treaty, fell far short of the amount found to be due, because the fund provided by the treaty fell short of the valid claims against Spain. The libellant claimed wages until his return to the United States; many objections were raised, and the points fully argued on both sides; the libel was dismissed in the district court, where the decree was *pro forma*, and the case brought to the circuit court by appeal from this decree. The points discussed in the argument will be seen from the opinion delivered by the court.

*Ardrey v. Karthaus.*

TANEY, C. J. The main point in this case appears to be a new one, and we are not aware of any case in which it has been directly decided; we must form our judgment, therefore, upon those principles which have been settled in analogous cases. The general rule is, that freight is the mother of wages, and where freight is earned, or damages recovered in lieu of it, the seamen are entitled to wages. It has frequently happened that, after the capture of a neutral vessel, and condemnation and sale, the sentence has been reversed in the appellate court, and restoration ordered, and in such cases, where the owner recovers freight, the seamen are, undoubtedly, entitled to wages.

The only exception to the rule is, the case of recovery against the underwriters. But that exception stands entirely on principles of policy; for as a seaman is not permitted to insure his own wages (and such a contract of insurance would be void in law), he cannot, for the same reason, protect his wages under the insurance of the owner; for that would allow him to accomplish indirectly what he is not permitted to accomplish directly.

We are not aware of any other exception to the rule above mentioned. The case of collision at sea has been referred to. Without meaning to impeach the decision in the case cited from the Massachusetts Reports, it may be proper to say, that no other case has been adduced upon the same subject, nor does the point appear to have been very deliberately examined in that case. It can, therefore, hardly be regarded as a settled rule of law, and if it could be so regarded, there are reasons sufficient to distinguish it from damages paid for freight under a decree of restitution, or by public treaty, or any other analogous proceeding. For as the damages given by a jury in a case of collision, would be a gross sum, it would commonly be difficult, and often impossible, to ascertain whether freight was allowed or not, for the voyage; or if allowed at all, to what amount, and upon what principles. The verdict of the jury being for a gross amount of damages, and there being no written

Ardrey v. Karthaus.

and authentic document showing the items which produced this gross amount, it would be difficult, in many cases, by the oral testimony of the jurors, to come to any certain conclusion; for some of the jurors might have arrived at the conclusion as to the proper amount of the result, by allowing freight, some without allowing it, and often the amount would be a compromise of conflicting opinions, without reference to any particular item, or any settled principle agreed on by the whole jury. The case of collision is not, therefore, an exception to the rule, but stands on principles peculiar to itself.

The court consider the general rule to be as above stated; that wherever freight is earned, or damages recovered in lieu of freight, the seamen are entitled to wages, and that the only exception to it is, the case of recovery against the underwriters, which rests upon principles of policy, as above mentioned. It is now contended, that capture by a public enemy ought also to be made another exception to the rule; the court do not see any principle of justice upon which this exception can be introduced; and they certainly would not be disposed, in the absence of any precedent, to sanction such an exception upon mere technical principles. If, in this case, after the capture, there was no *spes recuperandi*, and the case on that account distinguishable from the capture of a neutral, it would not affect the application of the rule; for, if without hope, and even against hope, the owner afterwards recovered damages in lieu of freight, the claim to wages is within both the letter and the spirit of the rule before stated. The wages of the seamen depend upon a *fact*—was freight earned? or were damages recovered by the owner in lieu of freight? If either of these facts is shown, it is sufficient; it does not matter whether the owner had or had not a right to hope for such an issue, upon strict legal principles. It is well settled that, in case of capture by an enemy, if the vessel is recaptured and freight earned, the seamen are entitled to their wages for the voyage. It

## Ardrey v. Karthaus.

would be difficult, indeed, to find a reason why they should not be entitled to wages in such a case, and equally difficult to assign a reason why they should not be also entitled, where the vessel, or the value of it, was restored to the owner, from any cause whatever, and damages paid to him in lieu of his freight.

But in this case there was a well-grounded *spes recuperandi*; for although, as between the American owner and the British captor, the American owner had no right to complain, nor any defence to make against condemnation in the prize courts of England; yet, as the capture was made within the territorial limits of Spain, and Spain was neutral, the American had a right to demand protection from the Spanish government; Spain was bound to interpose, and if she did not, she failed in her neutral obligations, and the American had a right to demand compensation from her. A neutral power is not at liberty to decide, according to her own convenience, whether she will perform her neutral obligations or not; she is bound to perform them, and if she fails to do so, she becomes herself responsible for the injury which she ought to have prevented.

In this case, the Spanish authorities ought to have restored the vessel to the owner when she was brought into San Andres; having failed to do so, the government was bound, through its minister, to have interposed before condemnation in England, and to have demanded her restoration; and if this demand had been made, the vessel could not have been lawfully condemned in England, but must have been restored. The American had a right to suppose that Spain would perform her neutral duties, and that England, upon her application, would restore the vessel. There was, therefore, a well-grounded *spes recuperandi*, if such a state of things could be deemed necessary to entitle the seamen to wages. The result has proved that there was foundation for a hope of recovery, for Spain has acknowledged the obligation, and paid the damages—or

what amounts to the same thing, the commissioners have so decided, and the owner has recovered damages for the loss of his vessel, and for freight; and the recovery is against Spain, and founded upon the failure of Spain to perform her neutral duty.

The seamen being entitled to wages, the next question is, for what time? The libellant remained in the vessel until she was condemned, and the freight allowed is for the outward voyage. In the case of a neutral, wrongfully captured by a belligerent, and which the nation or its courts afterwards restores or pays for, and where freight for the outward voyage has been allowed, the seamen are entitled to wages up to the time of condemnation. The reason given is, that as the seaman has a right to suppose that the capturing nation and its tribunals will do their duty, he has a well-grounded hope that the vessel will be restored and allowed to proceed on her voyage, and that his services will, therefore, be needed. The same foundation for hope existed in this case; the owner had a right to expect that Spain would demand the release of the vessel, and that she would be accordingly restored; and allowed to proceed on her voyage; and that hope was not lost until the condemnation in the prize courts of England. This case, therefore, is entirely analogous to the capture of a neutral on her outward voyage, and when after condemnation and sale, the owner receives compensation in damages. The libellant is, therefore, entitled to wages up to the day of condemnation, but no longer.

The remaining question is, whether an account is to be taken, and the wages to be reduced *pro rata*, on account of the expenses to which the owners have been subjected in prosecuting this claim, and on account also of the reduction to which they were compelled to submit, by reason of the deficiency of the fund out of which they were to be paid. The case of Sheppard and others v. Taylor, 5 Peters 675, appears to be conclusive on this point. According to the principles adjudicated in that case, the freight and the

*Ardrey v. Karthaus.*

ship itself, to its last plank, are liable to wages. The claim of the seamen is a preferred one, to be paid without any deduction for the losses or expenses of the owners; and damages in lieu of freight, or in lieu of the ship, stand on the same footing, according to this decision, with the freight or ship itself, and the wages are not liable to be charged for any share of the expenses which the owner incurred in prosecuting his claim for reparation—nor are they liable to abatement on account of the reduction of his compensation, occasioned by the insufficiency of the fund out of which he is compelled to accept payment. It is admitted, that the amount recovered for the ship and freight greatly exceeds the amount due for wages, upon the principles hereinbefore stated; and the libellant is, therefore, entitled to the full amount of his wages, up to the day of condemnation, deducting only the amount heretofore received by him.

The decree of the district court is, therefore, reversed, and a decree made in favor of the libellant for the sum of \$184 49 and costs.

*J. Glenn*, for appellant.

*C. F. Mayer*, for appellee.

ROBERT AGNEW

vs.

HEZEKIAH DORMAN.

A libel was filed in the district court, by a seaman, against the master of a vessel, to recover a balance of \$30 95, claimed to be due for wages; and also damages for an assault committed upon the libellant by the master, without claiming any particular amount of damages: the libel was dismissed by the district court, and in the circuit court, to which the case was taken by appeal, a motion was made to dismiss the appeal, on the ground that the record did not show that the sum in controversy amounted to \$50: a motion was thereupon made by the appellant, to amend his libel, by inserting that he had sustained damages, by the assault, to the amount of \$300: one of the witnesses had proved that he would not have run the risk of the blow given to the libellant for \$100: *Held*, that the amendment asked for could not be made; that the circuit court had no authority to review the decree of the district court, unless the sum in controversy amounted to \$50; and that the court could not permit an amendment to be made, the object of which was to change the record so as to give the court jurisdiction, in a case where, according to the record before them, they had none.

If the case showed that the appeal was legally before the court, then, having jurisdiction over it, the court could permit the pleadings to be so amended as to enable it to do justice between the parties; but it cannot acquire jurisdiction, by altering the record which has come to it from the district court.

The deposition of the witness does not show the amount of damages *claimed* by the libellant; and it is the *claim* of the libellant, and the answer of the respondent, denying the claim, that make the controversy, and ascertain the amount in dispute.

Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony has been received in the supreme court, upon appeal, to show its value, and to show the jurisdiction of the court.

And so too, as to the value of an office, where the right to the office is the matter in controversy.

But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court.

In all cases in the supreme court, where the appeal is dismissed for want of jurisdiction, the court gives no costs; and that being the rule in the supreme court, it is proper that the circuit court should adopt the same rule in analogous cases.



Circuit Court, April Term, 1838. Appeal from the District Court, in Admiralty.

This was a libel filed in the district court for the Maryland district, by a seaman against the master of the schooner Octavia, to recover a balance of \$30 95, which the libellant alleged to be due to him for wages, and also to recover damages for an assault and battery committed on him by the master. He did not, in the libel, claim any particular amount of damages for the assault, but prayed the court to give him heavy damages for it against the master.

The respondent in the district court, in his answer, objected to the libel, upon the ground that the claim for wages and the claim for damages for the assault and battery could not be united together in the same libel, and prayed that the same might be dismissed. The respondent, after taking this objection, proceeded in his answer to deny that anything was due to the libellant for wages, and insisted that the blow he gave him was justified by his improper and disobedient conduct.

Testimony was taken in the district court, and at the hearing the court, dismissed the libel, on the ground that the claim for wages and for damages for an assault and battery could not be united in the same suit. The libellant appealed to the circuit court, and the appellee now moved to dismiss the appeal, on the ground that there was nothing in the record to show that the value in controversy amounted to \$50, and that the circuit court, therefore, had no jurisdiction of the appeal; the balance for wages claimed being only \$30 95, and no particular sum being claimed as damages for the assault and battery.

The counsel for the appellant thereupon moved to amend his libel, by inserting an averment that the libellant had sustained damages by the assault and battery, to the value of \$300; the averment was objected to by the counsel for the appellee. *Mr. Williams*, for the appellant,

cited 11 Wheat. 1; Dunlap's Admiralty Practice 211. *Mr. Glenn*, for the appellee, cited 3 Mason 503.

TANEY, C. J. The amendment cannot be made. If the court had jurisdiction of the case, that is, if enough appeared in the record to show that the circuit court had a right to review the decision of the district court in this case, there is no doubt the court would have the power to allow any amendment necessary to bring the justice of the case fairly and fully to trial. But this court has no authority, by law, to review the decree of the district court, unless the matter in controversy amounts to \$50; the record does not show that it amounts to this sum; and the object of the amendment is to change the record, in order to give the court jurisdiction in a case where, according to the record before them, they have not jurisdiction; the court think this cannot be done. If the case showed that the appeal was legally in this court, then having jurisdiction over it, the court could permit the pleadings to be so amended, as to enable the court to do justice between the parties; but we cannot acquire jurisdiction by altering the record which has come to us from the district court.

*Mr. Williams* then suggested that one of the witnesses whose deposition was contained in the record, stated that he saw the assault and battery, and that he would not have run the risk of the blow given to the libellant for \$100.

TANEY, C. J. The deposition of the witness does not show the amount of damages claimed by the libellant, and it is the claim of the libellant, and the answer of the respondent denying the claim, that make the controversy, and ascertain the amount in dispute. Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony has been received in the supreme court, upon appeal, to show its value, and to show the jurisdiction of the court; and so too, as to the value

*Agnew v. Dorman.*

of an office, where the right to the office is the matter in controversy. But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court; and the amount in dispute is shown by the claim made by one, and the denial made by the other. The damages might in fact have amounted to \$100, and yet, if the libellant claimed but \$10, as his damages, \$10 would be all that was in controversy.

The circuit court dismissed the appeal, for want of jurisdiction, without costs; saying, that in all cases in the supreme court, where the appeal was dismissed for want of jurisdiction, the court gave no costs, and as that was the rule in the supreme court, it was proper that the circuit court should adopt the same rule in analogous cases.

*N. Williams*, for appellant.

*J. Glenn*, for appellee.

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ERNEST C. HERWIG, claimant of the SCHOONER ROSAMOND,

*vs.*

CHARLES OAKLEY.

Oakley advanced money, at New York, on bottomry, for the repairs of the schooner *Isabella* (afterwards "*Rosamond*"), of Port au Prince; the bond was dated 16 November 1829, and payable sixty days after the arrival of the vessel at Port au Prince, where she arrived on the 12th of December 1829; the title to her, at the time of the bottomry, was, according to her papers, vested in Dupesne, a merchant of Port au Prince, father-in-law of R. A. Windsor, the principal of the firm of Windsor & Co.: Oakley sent the bottomry-bond to Windsor & Co. for collection, supposing them to be the charterers; and they, on the 10th of January 1830, endorsed on the bond the following acquittance: "We hereby acquit Messrs. L. Dupesne & Co., owners of the schooner *Isabella*, as well as the said schooner, collectively or individually, of all liability or responsibility that might arise from this bot-

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tomry-bond, which, being entrusted to us by Mr. Oakley, we now cancel and annul, acknowledging ourselves to be the sole debtors to Mr. Oakley of the amount of disbursements paid by him on the schooner in New York, the said amount being, according to agreement, entered to our own account:" prior to the execution of this acquittance, a letter dated 31 December 1829, had been despatched by Windsor & Co., to Oakley, stating that *they* were the owners of the schooner, and that his advances on her account would be promptly remitted by them: Oakley, not knowing of the above acquittance, brought suit in the Haytien court, against Windsor & Co., and obtained judgment on the 14 September 1830, on an account, in which the amount of the bottomry-bond was included. On the 30 December 1830, Herwig (the claimant of the vessel) purchased her from Dupesne, who exhibited to him the bottomry-bond, with the acquittance of Windsor & Co. written upon it: at the time he made this purchase, Herwig was acquainted with the fact of the judgment recovered by Oakley against Windsor & Co., and that, notwithstanding this judgment, and the acquittance written on the bond, Oakley claimed his lien on the vessel under his bottomry-bond, as still subsisting. No evidence was offered by Herwig to prove that he paid full value for the schooner, and immediately after the purchase he changed her name to "*Rosamond*," and sent her to a port of the United States to which she had not been accustomed to trade: Windsor & Co. stopped payment in the month of September preceding the sale to Herwig. On a libel filed by Oakley, to enforce his bottomry-lien: *Held*, that the acquittance of Windsor & Co. was a fraud upon the libellant, and a mere nullity, and did not in any degree impair the security of the bottomry-bond.

The suit brought and judgment recovered by Oakley in Hayti, being in ignorance of the facts constituting the fraud, did not amount to a waiver of the bond.

But it would have amounted to a waiver, if it had been done with a knowledge of all the facts.

Herwig could not hold the vessel discharged from the lien of the bond, as he was a purchaser with notice of Oakley's claim.

His opinion as to the validity of that claim, did not alter his predicament; he had notice that Oakley made the claim, and having this notice, he bought at his peril, and the property in his hands was bound to the same extent and in the same manner as it was in the hands of the person from whom he purchased.

Circuit Court, April Term, 1838. Appeal from the District Court, in Admiralty.

TANEY, C. J. This is a proceeding on the part of Charles Oakley, to charge the schooner *Rosamond*, formerly the *Isabella*, with the amount due on a bottomry-bond, exe-

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cuted at New York, 16 November 1829. The vessel belonged to Port au Prince, in Hayti, and was consigned, with her cargo, by R. A. Windsor & Co., merchants of that place, to Oakley, the libellant; after her arrival in the port of New York, she was found to require extensive repairs to make her seaworthy, and the master having no funds, and being unable to raise the money, Oakley made the necessary advances on bottomry, and took the bottomry-bond from the master to secure himself. At the time the money was advanced by Oakley, and the bond taken, he did not know who were the real owners of the vessel, and had no funds of Windsor & Co. in his hands. The bond is on the schooner *Isabella* (now called the *Rosamond*) for \$1145 97, with seven per cent. interest, payable in sixty days after the arrival of the vessel at Port au Prince. She sailed from New York, a few days after the execution of the bottomry-bond, and appears, by a letter from Windsor & Co. to Oakley, to have arrived at Port au Prince before the 12th December 1829.

The bond was sent by Oakley to Windsor & Co., for collection; and it appears by the testimony of Roome, the clerk of Oakley, that it was forwarded to them, under the impression that they were the charterers, and not the owners of the vessel. There were other accounts and dealings between the parties, and when Oakley, at the end of the year, transmitted his account to Windsor & Co., the amount of the bottomry-bond was charged against them, because the bond had been sent to them for collection.

The title to the vessel, at the time of the bottomry, was, according to the vessel's papers, in Dupesne, a resident merchant of Port au Prince; and Heyliza, the master, and R. A. Windsor, the principal of the firm of R. A. Windsor & Co., both swear that the vessel was the property of Dupesne. But the master does not appear to have had any means of knowledge on the subject, except what he derived from the schooner's papers; and the conduct of Windsor has been such, that the court must regard his testimony as

entitled to but little consideration; for, in the letter of R. A. Windsor & Co. to Oakley, dated 12 December 1829, in reply to Oakley's letter informing them of the bottomry, and that he did not know who owned the vessel, they state that the schooner belongs to them; and they repeat this statement in another letter to him, dated 31 December 1829, and mention that they are about to send him an account of damages sustained on her voyage, by stress of weather, in order to obtain compensation from the underwriters.

Now, after such statements made to their commercial correspondent in New York, who, it appears from the papers in the case, was in advance for them on other accounts, Windsor comes before the court with an ill grace, when he appears here to prove that the schooner, at that time, belonged exclusively to Dupesne, and that his firm had no interest whatever in her. The testimony of such a witness cannot be respected, nor allowed to have any weight in the decision of this controversy.

Besides, his testimony is not only inconsistent with his letters, but it is inconsistent with other acts to which he was a party; his acquittance on the bottomry is made to "Messrs. L. Dupesne & Co., owners, collectively and individually;" but he states in his testimony, that Dupesne was her "*lawful and only owner*," and yet he gives no explanation of the reason for making the acquittance to "Messrs. L. Dupesne & Co., collectively and individually," instead of making it to Dupesne himself, "*her lawful and only owner*." The schooner was, certainly, documented in the name of Dupesne alone, and there is nothing in the evidence to show that this vessel was ever owned by the firm of "Messrs. L. Dupesne & Co.," except this acquittance; nor is it stated who composed the firm of Dupesne & Co.; neither does he inform us who composed the firm of R. A. Windsor & Co.; he states that he was the principal partner, and that he purchased the vessel in 1827.

Now, according to his own showing, he was, at that time, only seventeen years of age; for, in his deposition taken

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in 1833, he is stated to be at that time about twenty-three years of age. It cannot readily be imagined, that one so youthful could have been placed at the head of a firm carrying on such extensive business, unless his associate was some person who felt a peculiar interest in his welfare, and was willing to advance the interests of R. A. Windsor at some hazard to himself. Dupesne was his father-in-law; he may have been the partner in this firm, and taken the documentary evidence of ownership on account of the youth of his son-in-law; neither Windsor nor Dupesne states the time when the schooner was documented in the name of Dupesne; both of them carefully evade that point. Windsor says he purchased her in 1827, and that she then changed flag and name; but whether her new papers were in the name of Windsor & Co., or in the name of Dupesne, is not stated; he tells us that he sold her to Dupesne in 1829; this may be literally true, and yet the sale may have been made, after he was informed of the bottomry; for he received information of the bottomry-bond before 12 December 1829, and the sale may have been afterwards and before the close of the year. Now, if there had been a real and *bonâ fide* sale of this vessel in 1829, before the bottomry, it cannot be doubted, that Windsor would have given the date, and would not have answered in this loose and equivocal manner, which leaves it doubtful whether the alleged sale was before or after the bottomry.

Dupesne seems to be equally unwilling with Windsor to give the date of his purchase; he is asked by the libellant, "At what time he purchased the schooner, and from whom?" And he answers "All the documents are in the possession of E. C. Herwig:" this is his whole answer. It is a manifest evasion of the question, and an attempt to put the case exclusively on the formal documents of the vessel; and is a refusal to give to the libellant the information he asked for.

Dupesne knew, from the very nature of the proceeding,

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that Oakley disputed the validity of the acquittance which he had received on the bottomry, and if his own conduct in that matter had been free from reproach, he would gladly have availed himself of the opportunity of explanation offered him by the libellant, and have given a frank and full account of his connection with Windsor & Co. and the schooner. There is no reason to suppose that the documents of the vessel, in relation to her ownership, were ever changed, after she was purchased by Windsor & Co. in 1827, until she was sold to Herwig in 1830; and from the manner in which Windsor and Dupesne testify, taken in connection with the other testimony in the case, their collusion and co-operation with each other in this business, are too evident to be mistaken. The acquittance itself strongly implies that no money was paid by Dupesne to Windsor, in discharge of the bottomry. The acquittance is in the following words:

"We hereby acquit Messrs. L. Dupesne & Co., owners of the schooner *Isabella*, as well as the said schooner, collectively or individually, of all liability or responsibility that might arise from this bottomry-bond, which, being entrusted to us by Mr. Oakley, we now cancel and annul, acknowledging ourselves to be the sole debtors of Mr. Oakley, of the amount of disbursements paid by him on the schooner, in New York, the said amount being, according to agreement, entered to our own account.

R. A. WINDSOR & Co.

Port au Prince, 10th January 1830."

The amount of this acquittance, according to its language, is nothing more than this—that, instead of collecting the money due on the bond, he cancels and annuls it, and avails himself of the confidence reposed in him by Oakley, to deprive him of the security he had obtained. And this instrument is secretly executed by a young man, who, at the time of its date, was only twenty years of age, to release property, which is claimed by his father-in-law, from a lien to which it was honestly and justly liable. It



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is impossible to acquit the father-in-law, under such circumstances, of having participated in the fraudulent intentions of the son-in-law. The court considers the acquittance as fraudulent and void; it is a mere nullity, and does not in any degree impair the security of the bottomry. It is worthy of remark that, at the moment this acquittance was executed, which treats Dupesne & Co. as the owners of the schooner, the letter of Windsor & Co. to Oakley, of 31 December 1829, was actually on its passage to the United States, and in this letter they assure him, that Windsor & Co. were the owners of the schooner, and that his advances on her account will be promptly remitted by them.

It has been argued that, after this bond was taken, Oakley charged Windsor & Co. in account, with the amount of these advances, and afterwards included them in the account in which he brought suit against them and obtained judgment in the Haytien court; and that these acts are a waiver of the bottomry. It is true, that the advances for which the bottomry was taken were charged against Windsor & Co., by Oakley, in the account transmitted to them shortly after the bond was taken, and the same charge was continued in the account sent to Squirè & Reynolds, upon which the suit was brought against Windsor & Co., and the judgment obtained against them; and if the libellant had been apprised of the acquittance, these proceedings would, undoubtedly, have sanctioned what was done, and would have discharged the schooner from the bottomry. But it is proved by the clerk of Oakley, that the item was introduced, in the first instance, in the account, because the bond had been sent to Windsor & Co. for collection, and not because it had been collected by them. Indeed, the account sent at the close of the year 1829, was prior to the date of the acquittance; and these advances were naturally and properly continued in the account of 7 August 1830, afterwards transmitted to Reynolds & Squire, for the purpose of suit against Windsor & Co.,

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because Oakley had been informed by them, before he sent this account, that they were the owners of the vessel.

He certainly did not mean to waive his lien and rely on the personal security of Windsor & Co., for, in the orders he sent, with the account, to Reynolds & Squire, he directed them to proceed against the vessel as well as against Windsor & Co., and they would have proceeded against her on the bond, if the laws of Hayti had permitted them to do so.

It remains to be examined, whether Herwig, the claimant, stands in a different position from Windsor & Co. and Dupesne. If Herwig had been a purchaser, without notice of the claim of Oakley, he would, without doubt, be entitled to hold the vessel discharged from the bottomry. The possession of the bottomry-bond by the party appearing on the face of the papers to be the owner, with the acquittance endorsed upon it, would have been sufficient to justify the purchase; the more especially, as Oakley had obtained a judgment in the court of Port au Prince against Windsor & Co. for the whole amount of these advances; and the loss occasioned by the breach of trust of Windsor & Co., who were the agents of Oakley, must have fallen upon him, and could not, upon any principle of justice, have been visited upon an innocent purchaser, without notice.

But Herwig was not a purchaser without notice. Reynolds states, in his testimony, that Herwig, previously to his purchasing the vessel, informed his (the witness's) firm, of his wish to do so, when they warned him against it, on account of Oakley's claim, but that Herwig informed him, that Dupesne had exhibited to him documents to prove that the claim no longer existed on the vessel. Now, the vessel was sold to Herwig on the 29th December 1830, and this conversation took place when he was about to make the purchase; the acquittance bears date on the 10th January 1830, and Oakley's judgment against Windsor & Co. was obtained on the 14th day of September in the same year; so that Herwig, when he was about to purchase, was warned that, notwithstanding this acquit-

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tance, and the judgment for these advances against Wind-sor & Co., the bottomry on the vessel was still claimed by Oakley as a subsisting lien upon her.

Herwig may possibly have considered this claim as unfounded, and that the possession of the bond by Dupesne, with the acquittance upon it, discharged the lien. But his opinion as to the validity of Oakley's claim, does not alter his predicament; he had notice that Oakley made the claim, and having this notice, he bought at his peril, and the property in his hands is bound to the same extent, and in the same manner, as it was in the hands of the person from whom he purchased. This is the well-settled rule in courts of equity; it is founded in the principle of justice, and prevails also in courts of admiralty; and there is no department of business in which it should be more strictly enforced by courts of justice, than in commercial concerns, where, from the very nature of his pursuits, the merchant is compelled to confide in distant agents, who can easily give to fraudulent and colorable transactions, the form and semblance of real contracts.

Herwig, it seems, had seen the bottomry-bond, with the acquittance upon it, and knew that this acquittance was dated as far back as 10 January 1830; yet, nearly a year afterwards, he is warned that Oakley still claims his bond as a lien upon the vessel. Surely this was enough to put him upon inquiry before he bought; it was enough to satisfy him that Oakley did not admit the validity of this acquittance, and if he chose, with that knowledge, to become the purchaser, he must abide the consequences, and must stand upon the title of the party of whom he purchased; and if that title was subject to this lien, the one he acquired is bound in like manner. It was his voluntary act to buy a title which he knew to be disputed; and if he loses his money, it is his own fault. The right acquired by Herwig, the claimant to the schooner, was therefore no better than that of Dupesne, and the vessel came to his hands still charged with the amount due on the bottomry-bond.

There are, moreover, strong circumstances to show that if Herwig did not collude with Dupesne and Windsor & Co., he was yet sensible that he was purchasing a doubtful title. He avers, in his answer, that he paid the full value of the vessel, discharged from the bottomry, but he has offered no evidence to prove that the sum he paid was the full value; and immediately after his purchase, he changed the name of the schooner and sent her to a port of the United States to which she had not been accustomed to trade. These measures were well calculated to deceive Oakley, and to deprive him of the opportunity of enforcing his claim on the bottomry.

It is true, that the name of this schooner had been changed before, from that of the Robert Burns, to that of the Isabella, when she was bought by Windsor & Co., from her American owners. There was a reason for that alteration in the name; for the vessel, at that time, changed the American flag for the flag of Hayti; and the owner might very naturally suppose that the name of the Robert Burns was not very appropriate to a vessel sailing under the flag of Hayti, and that the name of the Isabella would be more suitable to her new national character. But no reason is assigned for the change of name made by Herwig; and as he had been warned that Oakley still claimed the bottomry on the vessel, this change of name and change of destination was so well calculated to mislead Oakley, and embarrass him in the pursuit of his remedy on the bond, that the court cannot regard it as an act of mere caprice or fancy; it has all the marks of contrivance and design. It does not even appear that Herwig, the claimant, was a merchant or ship-owner in any way engaged in trade before he became the purchaser of the Isabella. Windsor & Co. stopped payment in September 1830; and the transfer is made to Herwig about two months afterwards, when it was no longer safe to send the schooner to the United States in the name of her former owners.

It has been strongly pressed upon the court, that the libel-

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lant has waived his remedy on the bottomry by his own neglect and delay. But the claimant, being a purchaser with notice, stands in the same predicament with Windsor & Co. and Dupesne, and the delay which has taken place has been occasioned by the respondent himself, or those under whose title he claims. The bond was executed at New York, 16 November 1829, payable sixty days after her arrival at Hayti; she arrived there before the 12th December; it does not appear that she ever returned to any port of the United States, or was at any port where Oakley had an opportunity for enforcing the bond, until after she was transferred to the present claimant, on the 29th December 1830; the libellant endeavored to enforce it at Port au Prince, where the vessel belonged, but the testimony of Reynolds shows that, by the laws of that place it could not be done. After she was transferred to the present claimant, she came to Baltimore, for the first time, on the 28th February 1831, but she came under a new name, and appeared to be owned by another person; she came again, on the 3d June 1831, and before she left the port, on the 23d of that month, the process in this cause was issued against her. In all this the court see no want of reasonable diligence on the part of the libellant; on the contrary, he must have been vigilant and active in the pursuit of his remedy, or he could not have so soon discovered her under her new name, with her new owner, in her new place of trade, distant, as it was, from his own place of residence; and there is nothing in the evidence which can impute to him neglect or unnecessary delay, and nothing which ought to deprive him of the lien of his bottomry-bond, against a claimant who stands in the predicament of the present respondent.

The decree of the district court must, therefore, be affirmed with costs.

*Charles F. Mayer*, for appellant.

*J. Glenn*, for appellee.

## PHELPS, DODGE &amp; Co.

vs.

## THE BRIG CAMILLA.

S. & T., at New York, were agents and consignees of the brig Camilla, owned in Boston: at the request of the master of the Camilla, S. & T. gave their written order on P., D. & Co., for certain copper required to repair the vessel; the order was delivered by a clerk of S. & T.; in the order no mention was made of the vessel or her owners, and the copper was furnished by P., D. & Co., and charged on their books to S. & T., to whom they also presented the account for the copper, and whose negotiable note they took, payable in six months: S. & T. charged the Camilla, on their books, with the amount of the note, deducting three per cent. therefrom, to make it a cash transaction. The Camilla sailed from New York on her voyage: before the note fell due, the owner of the vessel, and also S. & T. became insolvent, and this libel was filed by P., D. & Co., against the vessel, whilst lying at Baltimore, to recover the amount due for the copper: *Held*, that *prima facie*, the necessary repairs furnished by material men, to a foreign ship, are a lien on the vessel.

The six months' credit given would not prevent the lien from attaching.

But if the credit was given to the owner or any one else, and not to the vessel, then there was no lien.

Where the owner of a vessel has an agent residing at the place where the repairs are being made, who purchases the materials in his own name, and gives his personal undertaking to pay the price, there will be no lien on the vessel, unless specially given.

In such case, the transaction becomes an ordinary one between buyer and seller, and although the materials are afterwards applied to the use of the vessel, that circumstance will not create a lien upon her.

The materials must be supplied for the vessel, and upon her credit, in order to create a lien.

Even if the materials had been originally charged to the vessel and her owner, the lien thus acquired would have been waived, by the material men afterwards taking the individual note of the agents or of the owner.

If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied.

If he takes a note or bill of exchange, or any other personal engagement for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue.

Circuit Court, April Term, 1838. Appeal from the District Court, in Admiralty.

The libel in this case was filed in the district court on the 21st of April 1837, by the members of the firm of Phelps, Dodge & Co., of New York, against the brig *Camilla*, of Boston, then lying at the port of Baltimore, and against E. G. Wiswell, and all others who might intervene in the cause.

The claim was for materials furnished by the libellants to said vessel, at New York, between the months of August and November in the year 1836; and alleged to have been furnished at the request of the master, and upon the credit of the vessel, as well as of the owners and master thereof.

The libellants' claim was contested by the master of the vessel, who answered the libel, stating that he had been master of the brig *Camilla* since the 1st of March 1836, and contended, by way of plea, that the said libel could not be sustained against the said brig or the respondent, according to the law of the land and the course of admiralty proceedings, but that the same, if any claim existed which could be enforced in admiralty, could only be enforced or sustained separately against the brig *Camilla*, her tackle, apparel and furniture, or against the owner, or the master thereof, or against the two latter jointly. And for further plea in this behalf the respondent contended and insisted that if any lien existed against the said brig (which was not admitted), the same had been lost or relinquished, as would thereafter appear by the answer, or the evidence adduced in support of it. And for further defence and answer to the aforesaid libel, the respondent stated that the said brig was, from the 17th day of September to the 16th of October 1836, in the port of New York; when and where, certain repairs being required for her, some person (it was presumed the libellants) furnished the copper set forth in their accounts, and the respondent admitted that the said account was true and correct, as there shown, so far as respected the furnishing

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thereof for the use of the said brig; that during, or about the same time, Smith & Town, merchants in New York, to whom the said brig and cargo were consigned, received for the owner of the said brig (who was T. D. Parker), and for the respondent as master, \$1775, which was sufficient to pay all bills and charges against the said brig and master, including the account of the libellants; and the respondent supposed and believed that the funds thus in their hands for this purpose had been honestly applied accordingly, but whether this account was paid or not, the respondent did not know, further than that provision was made for payment.

The respondent further set forth that the said brig belonged to the port of Boston, that she went from that port to Rio de Janeiro, thence to New Orleans, and thence to New York, where she lay one month, during which said copper was furnished, and the repairs aforesaid were made; that on the 1st of October 1836, the respondent advertised her, in three newspapers, to sail to Rio de Janeiro on the 5th of October; that then he advertised her to sail on the 10th of October, and lastly, on the 15th of October, and she did actually sail on the 16th of October 1836; that during all this time, the libellants made no application for payment, nor did he know or suppose they had not been paid, for other bills were actually paid by said Smith & Town, and among others, the caulkers and gravers who put on the said copper. That having arrived at Rio de Janeiro, where she lay some time, the brig returned to New York, where she lay twenty days, and during all this time, the libellants did not call on the respondent for payment of their account, although the brig's arrival was advertised in all the newspapers in New York, and he believed it to have been paid. That having cleared from the custom-house in New York, which clearance was advertised in the different newspapers, two days afterwards, to wit, from the 20th to 25th of March 1837, she sailed for Baltimore, where she arrived on the 27th of March; and that the first time the respondent



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knew that the account aforesaid was not paid, was seeing the monition in this case stuck upon the mast of the said brig, on the 22d of April 1837.

And the respondent further alleged that the libellants, who made the contract for furnishing the said copper with the said Smith & Town (this respondent never having seen either of the libellants, nor ever been called on by them), looked to Smith & Town for payment, and not to the said brig or to her then owner or master; and even if they did not, their lien, if any they had, had been lost by their neglect to enforce it, when the said brig was in New York repeatedly, and by their acquiescence in her repeated departures therefrom; and also had lost all claim on the owner or master of said brig. The respondent also prayed leave further to state, that since the arrival of the said brig in the port of Baltimore, to wit, on or about the 8th of April 1837, she, with her tackle, apparel and furniture, had been sold to a certain William Dehone, of Boston, who had no knowledge of this pretended claim, at the time of his purchase, the libel in this case having only been filed on the 21st of the same month.

It was agreed, in writing, between the parties, that the copy of the deed of trust for the benefit of creditors, from T. D. Parker to William Dehone, of Boston, might be given in evidence; and also that the New York newspapers, containing advertisements offering the brig Camilla for sale, freight or charter, and announcing her clearances, departures and arrivals at the port of New York, might be offered in evidence, to prove the facts set out in such advertisements. And it was also agreed, that said brig was, at the time the copper and materials were furnished as set out in the accounts, in the port of New York, and belonged to the port of Boston.

A commission was issued to New York to take testimony, at the execution of which, Smyth Clark, a competent witness produced by the libellants, stated that he knew the brig Camilla (Captain E. G. Wiswell), at the port of New

York, about the months of August and November 1836; he always understood the brig was owned by T. D. Parker, of Boston, and she belonged at that time to the port of Boston. That he never saw the bill of copper filed by the libellants, but he knew there was copper furnished by the libellants for the use of the said brig Camilla, the prices of which he could not recollect, but that the total amount of the bill was correct, being upwards of \$1100; that the copper was furnished said brig at the request of her master. The brother of the owner, Mr. Stanton Parker, Jr., requested deponent to send down the copper, after the master had given the order; but said Stanton Parker was not, to deponent's knowledge, either part-owner, or acting as agent of the owner.

That the copper was furnished, through Smith & Town, in the following manner: deponent was then a clerk of the said house of Smith & Town, and by their authority gave an order on the libellants to supply the copper, after the master requested it to be done; Smith & Town were then the agents of the brig, and had been so previously. That he could not say that the copper was furnished on the credit of the brig and her owners, nor that the libellants were informed it was for the use of the brig. The written order was in the name of Smith & Town, and signed by deponent as their clerk; it did not mention the brig Camilla; deponent could not say in what manner the libellants looked to Smith & Town's note when they took it, nor why the bill referred to in the defendant's fourth interrogatory, was made out to Smith & Town. Deponent knew that the copper was for the brig. From the appearance of that bill, if he looked at it alone, he would say that Smith & Town were looked to.

Smith & Town gave their note to Phelps, Dodge & Co., in settlement of the bill, through the deponent; such bill, when originally rendered, extended to the figures \$1197 08, inclusive, and the deduction of three per cent. interest was a subsequent matter, to make it appear as cash between

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owner and agent. Previously to sending the order, deponent called on the libellants to know the price, and that being approved of by Stanton Parker, deponent gave the order; the bill above mentioned was checked by deponent and had some of his writing on it. That he had heard the captain say that the copper was necessary for the brig. That within a day or two of the protest of the note given by Smith & Town for the copper, perhaps on the same day, deponent delivered a message from Smith & Town to the libellants, informing them that they would not be able to take up the note, and that the vessel for which the copper was furnished, was then lying at Baltimore. In making up the accounts of Smith & Town against the brig, long before their failure, such copper was charged in the blotter to brig Camilla, and posted to the credit of T. D. Parker, the owner.

On cross-examination, he stated that he gave the order for the copper, being the clerk of said Smith & Town; that he was now a merchant; he never examined the brig before the copper was furnished; he knew nothing personally of her being seaworthy or not, and his only information upon the subject was that obtained from the captain and before stated.

Nathaniel E. James, on the part of the libellants, stated that he knew of the copper being furnished by the libellants, at the prices charged, for the use of the Camilla; deponent delivered the copper himself. That the copper was furnished through Smith & Town; he did not know personally of their being agents of the brig or of her owner; the copper was furnished at the request of Smith & Town; the entry in the libellants' books was made by him, in the hurry of business, and by mistake charged to Smith & Town, instead of "The Brig Camilla and owners, per Smith & Town," as was the uniform usage of the libellants; that the bill was made out from deponent's entry; afterwards, when the error was detected, which was several months subsequently, the entry

was corrected. As to the credit on which the copper was sold, he could only say, that the settled rule of the house was to enter a charge for copper furnished, against the vessel and the owners thereof; he believed the present the only case in which he made a different entry; he considered that the libellants looked to the brig and owners, as responsible, in case the note of Smith & Town was not paid.

On cross-examination, he stated that Mr. Clark, the clerk of Smith & Town, called upon the libellants to buy the copper, and the order was given by said Clark as their clerk; that deponent was a clerk; he never examined said brig, and knew nothing about whether she was seaworthy or not.

Smyth Clark, being again examined on the part of the respondent, stated that Smith & Town were consignees of the brig Camilla. That the paper marked Exhibit A. was a bill furnished the consignees by the libellants for the copper; this bill was settled by a note given by Smith & Town, at six months, which was not paid at maturity; that the firm of Smith & Town suspended payment about the 1st day of April 1837.

By a further agreement, it was admitted, that the statement of the witness examined under the above commission, "that the captain of the Camilla stated that the copper in question was necessary for the brig," be received in evidence, without objection to its admissibility, on the ground that it was the declaration of the captain, who ought to have been produced and examined; also, that the libel be considered as amended so far, that the same be a libel *in rem* and not *in personam*, and that the plea to that part of the libel be withdrawn.

The bill rendered by the libellants to Smith & Town, and referred to in the testimony as Exhibit A., was headed as follows:—

"Messrs. Smith & Town,

Bought of Phelps, Dodge & Co."

The bill referred to as Exhibit B. being the one filed

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with the libel, differed only from Exhibit A. in the heading, which was as follows:

“Brig Camilla & owners, per Smith & Town,  
To Phelps, Dodge & Co., Dr.”

The case having been argued on appeal, the following opinion was delivered by—

TANEY, C. J. The libel is filed in this case in order to charge the brig Camilla with the sum of \$1197 08, the amount due libellants for copper sold by them, and applied to the use of the brig.

The Camilla belonged to the port of Boston, and was owned by Theodore D. Parker, of the state of Massachusetts. The brig being in the port of New York in the month of September 1836, and requiring new copper to make her seaworthy, the master applied to Smith & Town, merchants of New York, who were the agents and consignees of the brig, to procure the necessary supply; the copper was bought from the libellants, on a credit of six months, in the following manner: Smith & Town gave their written order on the libellants for the copper, which order was sent to them by one of the clerks of Smith & Town; the order for the copper did not mention the brig Camilla or her owners, and was simply an order from Smith & Town. Upon this order, the copper was furnished by the libellants, and charged in their books to Smith & Town, and no reference whatever was made in the entry to the brig or her owners; and the libellants afterwards presented their account to Smith & Town, for the amount, and took their negotiable note, payable in six months.

The account originally presented by them has been produced, and is headed as follows:

“New York, September 30, 1836.

Messrs. Smith & Town,

Bought of Phelps, Dodge & Co.”

The note given by Smith & Town does not purport to

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be made by them as agents, but is their own personal engagement to pay the money, and is in the ordinary form of a negotiable note; and in their accounts with Theodore D. Parker in their books, they charged the amount of the note, deducting three per cent. from it, against the brig Camilla. The three per cent. was deducted in order to make the transaction a cash one, as between the owner and consignees.

The brig, on the 16th of October 1836, after these repairs were made, sailed for Rio de Janeiro; from which place she returned to New York, about the 1st of March 1837; remained there about twenty days; then sailed for Baltimore, where she was found when the process in this case was served upon her. Parker, the owner of the vessel, stopped payment in March 1837, and on the 26th of that month, executed a deed to a trustee, conveying all his property for the benefit of his creditors. Smith & Town stopped payment about the 1st of April 1837, and within a day or two of the time when the note for the copper fell due, they informed the libellants that they would not be able to take up the note, and that the vessel, for which the copper was furnished, was then lying at the port of Baltimore; the libellants thereupon instituted these proceedings against the vessel, and the monition was served on the 22d of April 1837.

These are the material facts in the case. It is true, that Nathaniel E. James, the clerk of Phelps, Dodge & Co., states that the entry above mentioned, in the books of the libellants, was made by him in the hurry of business, and the copper, by mistake, charged to Smith & Town, instead of the "Brig Camilla and owners," per Smith & Town; and that when the error was detected, which was several months afterwards, the entry was corrected. But the court think that the charge against Smith & Town is not accounted for, by the statement of the witness, that it was made in the hurry of business; for the account afterwards rendered to them, charged the copper in the same manner. The

personal engagement of Smith & Town was also taken for the payment of the money in six months; and Phelps, Dodge & Co. not only received this note, but afterwards negotiated it, or intended to negotiate it, as appears by their endorsement upon it, which has since been cancelled. These acts of the libellants, taken together, can hardly be reconciled with the notion, that Smith & Town were erroneously charged with the copper, by a mistake of the clerk, in the hurry of business. If the copper had been charged to the "brig and her owners," per Smith & Town, they would not have been personally responsible to Phelps, Dodge & Co.; yet, all the acts of the parties are perfectly consistent with their personal responsibility, according to the charge in the original entry, and inconsistent with the one subsequently made; for Smith & Town, after having given their note to Phelps, Dodge & Co., at six months, proceed to charge against the owner the cash price of the copper, as if the amount had been settled with the libellants by them; besides, the vague manner in which the witness states the time when the error was discovered, and the omission to mention what circumstance led to the discovery, leave no doubt (when the testimony of this witness is compared with that of Smyth Clark) that this alleged error was never discovered, and the alteration in the libellants' books never made, until they were informed by Smith & Town that they were about to stop payment. An alteration made in the books of the libellants, under such circumstances, cannot be allowed to affect, in any degree, the decision of the controversy now before the court.

It is admitted in the argument, that the lien given by the statute of New York cannot affect this case, and the question to be decided is, whether the debt due to Phelps, Dodge & Co., for this copper, is, by the general maritime law, a lien on the brig.

*Primâ facie*, the necessary repairs furnished by material men to a foreign ship, are, without doubt, a lien on the vessel. The Camilla was a foreign vessel in the port of

New York, so far as this question is concerned; the copper, it appears, was necessary, and the credit of six months would not prevent the lien from attaching. But all the authorities on the subject agree that, if the respondents show that the credit was given to the owner or any one else, and not to the vessel, then there is no lien; and I think it evident, from the testimony in this cause, it was furnished on the personal credit of Smith & Town.

In the case of the *St. Jago de Cuba*, 9 Wheat. 417, the supreme court decided that, if the vessel was in the port of a state to which she did not belong, yet, if the owner was present, and the contract made personally with him, it would be presumed to be made on his personal credit, and there would be no lien on the vessel, unless it was specially given. Can there be any difference in principle, where the owner has an agent residing at the place, who purchases the materials in his own name, and gives his personal undertaking to pay the price? I think not. If the circumstance that the contract was made with an owner transiently present at the port, would repel the legal presumption that the credit was given to the vessel, it would seem to follow, that the same rule must govern, where the contract was made by the consignee and agent of the owner, and he became personally responsible to the party furnishing the materials. In either of these cases, the transaction becomes an ordinary one between buyer and seller, and although the materials are afterwards applied to the use of the vessel, that circumstance will not make them a lien upon her; they must be supplied for her and upon her credit, in order to create the lien.

In the case before the court, they were, in truth, furnished to the vessel by Smith & Town. Phelps, Dodge & Co. sold the copper to Smith & Town, upon their personal credit, and Smith & Town furnished it to the brig; this is obviously the real history of this transaction, and Phelps, Dodge & Co., therefore, never had a lien upon the brig for the price of this copper.



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There are strong reasons for believing that Smith & Town had funds of the owner of the *Camilla* in their hands, at the time this copper was purchased; for they would otherwise hardly have given their note for it, at six months, at the credit price, and charged it against the owner, at the cash price, deducting in their charge three per cent. from the amount for which they gave their note. And if they had funds in their hands, it would readily account for the manner in which they procured the copper, and would show the reason for purchasing it in their own names, and upon their own responsibility, instead of procuring it as agents merely, and upon the credit of the brig and her owner.

But I do not put the decision upon this ground, for if the issue of the controversy depended on this fact, I should have thought it incumbent on the respondents to establish it by more satisfactory proof, than the inference to be drawn from the circumstance I have mentioned. I do not, therefore, place the decision upon the ground that Smith & Town had funds in their hands sufficient to purchase the copper, but upon the ground, that the whole evidence shows, that it was sold to them by Phelps, Dodge & Co., upon their personal credit, and was not furnished on the credit of the brig and her owner; and that the first entry in the books of the libellants, gives the true account of the transaction.

It must not, however, be understood, that the decision would be different, if the copper had been originally charged to the *Camilla* and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig; but that lien, in my opinion, would have been waived by taking afterwards the note of Smith & Town. This is the doctrine recognised in *The Brig Nestor*, 1 Sumner 73; and in the case of *Murray v. Lazarus*, 1 Paine 576, 577, where the material men had agreed with the master to take a bill of exchange on the

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agents of the owners, the court held that it was a waiver of the lien.

In the last-mentioned case, the court say: "If this is to be considered a regular and ordinary bill of exchange, it was a satisfaction for any lien that might have existed, and must be considered as a relinquishment thereof." The same may be said of the note given by Smith & Town in this case, even if the account in the books of Phelps, Dodge & Co. is corrected in the manner stated in the testimony of James. If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue.

In either view, therefore, of the facts stated in the testimony, there is no lien on the *Camilla*, for the copper furnished by the libellants, and the decree of the district court dismissing the libel must, therefore, be affirmed.

I have said nothing of the deed made by Theodore D. Parker for the benefit of his creditors, because I do not think that the deed affects the merits of this controversy; and upon the principle adopted by the court, the decision must have been the same, even if Parker had remained solvent, and was still the owner of the brig.

Decree affirmed, with costs.

*R. N. Martin* and *Geo. W. Nabb*, for appellants.

*N. Williams*, *Joseph B. Williams*, and *John H. B. Latrobe*, for appellees.

JOHN F. STROHM, Claimant of the SCHOONER ANNE  
and Cargo,

*vs.*

UNITED STATES.

Construction of the act of congress, passed 20th April 1818, ch. 91 (in relation to the slave-trade).

The appellant built and fitted out two vessels at Baltimore, for a Portuguese merchant named De Sylva, member of a mercantile house at Bahia, and residing in Cuba; they were built under the superintendence of two men sent to Baltimore for that purpose from Havana, and who were to have command of the two vessels when built; De Sylva placed \$14,000 in the hands of the appellant, his factor, in Baltimore, to be applied towards the construction of the vessels, and offered to pay any further sum that might be required. When the first of these vessels, called *The Anne*, was ready for sea, she was registered as the appellant's own property, and the usual oath of ownership taken by him at the custom-house; as soon as she was so registered, she was seized by the collector, and proceedings were instituted against her in the district court, under the second section of the act of congress, passed 20th April 1818, ch. 91, on the ground that she was fitted out for the slave-trade, and the appellant appeared to these proceedings as her claimant; it was proved on the trial, that she was built and fitted out for the slave-trade, and that the appellant knew she was intended to be so employed: *Held*, that as the contracts for building the vessels, were made with the appellant, and the bills and expenses paid by him, as factor for De Sylva, the vessels must be regarded as built, fitted out and equipped by him, as factor for De Sylva, in the sense in which those words are used in the act of congress.

If the guilty purpose was entertained by the owner for whom the vessel was built or equipped, it is immaterial, whether the person who builds her or equips her, as factor or master, was apprised of it or not.

In order to work a forfeiture, a criminal intent must exist in the mind of the party who is lawfully entitled to direct the employment of the vessel; if the owner places the vessel under the control of a factor or master, who builds or equips her, with that unlawful intention, having at the time authority from the owner to direct the employment of the vessel, the offence described by the law is committed, and the vessel is liable to the penalty.

As the factor or master derives his authority over the vessel from the owner, she is, in their hands, responsible as fully, for any violation of law, as if the owner were present and directed it.

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The fair construction of the act of congress is, that where the criminal purpose is proved to exist in the owner, or in the factor or master, who has the direction of the vessel at the time she is built or fitted out, the forfeiture attaches; and if the owner entertained the purpose, or the factor or the master, having at the time the control and direction of the vessel, the purpose of either one of the three being proved, it is not necessary to bring home the knowledge or purpose to either of the other two.

Circuit Court, April Term, 1840. Appeal from the District Court, in Admiralty.

This was an appeal from the decree of the district court, condemning the above-named vessel, upon the ground that she was built, fitted out and equipped, at the port of Baltimore, for the purpose of being employed in the slave-trade. The vessel was seized and proceeded against under the second section of the act of the 20th of April 1818, ch. 91.

It appeared from the evidence, that this schooner (together with another of a like description built at the same time), was built for a Portuguese merchant, named De Sylva, who was a partner of a mercantile house established at Bahia, in South America; but De Sylva himself generally resided in Cuba. The two vessels were built under the superintendence of two men who were sent to Baltimore for that purpose, from Havana, by De Sylva; one of these men was a Spaniard and the other a Portuguese; and it appeared from the letters of De Sylva, introducing them to his factor, that they were to have the command of these schooners, as masters, in his service, when the vessels were finished. The contracts for the building and equipping these vessels were made by Strohm & Co., merchants of Baltimore; who were the factors of De Sylva, and in whose hands he placed \$14,000, to be applied towards the building and equipping of the vessels, with an offer to pay anything further that might be found necessary to complete them.

When the Anne was finished and equipped, and ready to sail, she was registered by Strohm & Co., as their own

property; and the usual oath of ownership was taken by Strohm, at the custom-house, in order to obtain for her American papers. As soon as Strohm thus registered her, she was seized by the collector, and the proper information lodged against her with the district-attorney; after some evident hesitation and wavering on the part of Strohm & Co., they appeared in court and claimed the schooner, and denied that she was built for the purpose of being employed in the slave-trade; and appealed from the decree of the district court condemning the vessel.

The counsel for the appellant contended, 1st, that there was no sufficient evidence to prove that the vessel was built or equipped for the slave-trade: 2d, that if De Sylva intended to employ her in the slave-trade, there was not sufficient evidence to show that Strohm & Co. knew it: and 3d, that the schooner having been built and equipped by Strohm & Co., as factors, she was not liable to condemnation, unless Strohm & Co built or equipped her for the purpose of being employed in the slave-trade, and that the guilty purpose must be entertained by the party who builds or equips the vessel, in order to subject her to forfeiture.

TANEY, C. J., said, that upon the two first points above stated, it was very clear that The Anne was built for the slave-trade, and that Strohm & Co. knew it, and he then entered into a particular examination of the testimony, to show that it established the fact beyond a reasonable doubt.

In relation to the 3d point, he said, it was true, that the vessel was built, fitted out and equipped by Strohm & Co. as factors, and not by De Sylva himself, as owner, nor by the two men, as masters, who superintended the building. The contracts were made with Strohm & Co., and the bills and expenses paid by them, as factors for De Sylva, and the schooner must therefore be regarded as built, fitted out and equipped by them, as factors, in the sense in which these words are used in the act of congress. But as the

court was satisfied, upon the evidence, that Strohm & Co. knew the vessel was intended to the slave-trade, and built her for that purpose, she was liable to forfeiture, even upon the construction of the act of congress contended for by appellant.

The court were, however, of opinion that, if Strohm & Co. had been ignorant of the purpose for which De Sylva procured the schooner to be built, it would make no difference. If the guilty purpose was entertained by the owner, for whom the vessel was built or equipped, it is immaterial whether the person who builds her or equips her, as factor or master, was apprised of it or not. Upon any other construction the law would be nugatory; for it would be very easy for the foreign owner who, through a factor or a master, procured a vessel to be built or equipped for the slave-trade, in a port of the United States, to conceal from them any positive knowledge of the uses for which the vessel was intended. In general, the purpose of employing the vessel in the slave-trade, can exist only in the mind of the owner, for he has the power to control her movements; and if he procured her to be built or equipped for such a purpose, she is liable to forfeiture, although the factor or master, through whom the work was done, knew nothing of her destination. In order to work a forfeiture, a criminal intent must exist in the mind of the party who is lawfully entitled to direct the employment of the vessel; this the owner may always do; but if he places her under the control of a factor or master, who builds or equips her with that unlawful intention, having at the time authority from the owner to direct the employment of the vessel, the offence described by the law is committed, and the vessel is liable to the penalty.

And inasmuch as the factor or master obtains his authority over the vessel from the owner, she is, in their hands, responsible as fully for any violation of law, as if the owner were present and directed it. Indeed, it might well happen, when the owner resided in a foreign country, that

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the unlawful purpose of the master or factor could be abundantly proved, while it would be impossible to offer any evidence of the knowledge of the owner.

The fair construction of the act of congress is this: that where the criminal purpose is proved to exist in the owner, or in the factor or master, who has the direction of the vessel at the time she is built or fitted out, the forfeiture attaches; and if the owner entertained the purpose, or the factor, or the master, having at the time the control and direction of the vessel, the purpose of either one of the three being proved, as above-mentioned, it is not necessary to bring home the knowledge or purpose to either of the other two; the purpose of either one of them, as above stated, would subject the vessel to forfeiture. Here, however, it is clearly established by the evidence, that the owner, the factor and the master, all had a perfect knowledge of the unlawful purposes for which *The Anne* was built and fitted out: and in either view, therefore, of the construction of the act of congress, she must be condemned.

The decree of the district court is, therefore, affirmed with costs.

*J. Glenn* and *R. Johnson*, for appellant.

*N. Williams*, District Attorney, for appellee.

VIRGINIA AND MARYLAND STEAM NAVIGATION CO.,  
Claimants of the STEAMBOAT JEWESS,

vs.

UNITED STATES.

The proper construction of the act of congress of the 7th July 1838, in relation to steamboats, is, that more than six months must not elapse after one examination of a steamboat's boilers, before another is made.

In a proceeding under that act, against a steamboat, to recover the penalty incurred by carrying goods and passengers, without having had her boilers inspected within the preceding six months, the corporation owning the vessel appeared as claimants, by the name of "The Virginia and Maryland Steam Navigation Company," but their correct corporate name was "The Virginia and Maryland Steamboat Company;" the decree of the district court was, "that the owners of the steamboat Jewess forfeit and pay to the United States the sum of \$500, one-half to the use of the informer; and that the said steamboat, her tackle, apparel and furniture be sold," &c.: Held, that as the corporate owners of the steamboat had voluntarily appeared as claimants, the corporation, under the name by which it appeared (even though the wrong one), were parties to the suit, and no objection could be taken to the decree for want of process against them.

But that the decree, so far as it was against the owners, was erroneous, by reason of the form of the proceeding.

That the penalty imposed by the act of congress could not be recovered from the owners, in an admiralty proceeding, by libel.

That the mode of recovering the penalty from them, prescribed by the 11th section of the act, was by suit or indictment, according to the forms of the common law.

But that, so far as it directed a sale of the vessel, the decree was correct.

Circuit Court, April Term, 1840. Appeal from the District Court, in Admiralty.

The facts of this case are sufficiently stated in the opinion delivered by—

TANEY, C. J. This is an appeal from the decree of the district court, in a proceeding under the act of congress of 7th July 1838, in relation to steamboats.



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A libel was filed by the district attorney of the United States, in the district court, on the 17th of June 1839, charging that the steamboat *Jewess*, belonging to the district of Baltimore, transported goods and passengers from Baltimore to Norfolk, without having had her boilers and machinery examined within six months preceding that time, whereby the owners of the steamboat (who were unknown to the district attorney) had forfeited the sum of \$500, one-half to the informer; and for which sum the said steamboat was liable. The libel then prays that the said vessel may be seized, condemned and sold, and the proceeds brought into court to be distributed according to the practice of the court and the act of congress.

Upon this libel, process was issued, in the usual form, against the vessel, and she was accordingly seized by the marshal; whereupon, the Virginia and Maryland Steam Navigation Company appeared in court, and put in their claim and answer, denying that the *Jewess* had transported goods or passengers, without having had the boilers and machinery inspected once in every six months.

Upon the hearing in the district court, at September Term, 1839, it was decreed by the court, "that the owners forfeit and pay the sum of \$500, and that the steamboat be sold, and the proceeds brought into court to pay the said forfeiture and costs; the residue, if any, to be subject to the future order of the court."

It appears from the testimony, that the boilers and machinery were regularly inspected 8th December 1838, and that there had been no subsequent inspection before the 15th June 1839, at which time, goods and passengers were transported, as detailed in the libel.

Two objections have been taken to the decree: 1. That the time had not elapsed within which the owners were bound to have the inspection made: 2. That the decree is against the owners of the *Jewess*, as well as against the vessel, and that in the form of the proceedings adopted by

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the district attorney, the penalty imposed upon the owners cannot be recovered.

There is no foundation for the first objection. The argument on the part of the claimant is, that the words used in the act of congress, in relation to the times of inspection, mean that the said inspection should be made once in each half year; and that, if an examination is made once in each six months of the year thus divided, whether it be early in the period of six months, or late in it, the law is complied with and no penalty incurred.

The words of the law require the examination to be made "at least once in every six months," that is to say, more than six months must not elapse after one examination, before another is made. This is evidently the meaning of the words used in the law; there must not, at any time of the year, be a period of six months within which an examination has not been made. The construction of the claimants would defeat the object of the law; for, according to that construction, the two examinations in the year might be made within a week of each other (the first near the end of the first half year, and the second near the beginning of the second half year), and the boat might continue running for more than eleven months without any examination of her boilers and machinery. Neither the words nor the objects of the act of congress countenance such a construction.

The second objection presents a question of more difficulty. Undoubtedly, no decree can be had against the owners personally, or as a corporation, unless they are made parties to the proceedings in the character in which they are to be charged. They are not made parties by the libel, either individually or as a corporation, and no process was prayed for or issued against them; but the *Jewess* is the property of the corporation, which is the appellant in this court; and that corporation appeared in the district court, and voluntarily became a party to the proceedings there, and was heard in the defence. It is true, they appeared by

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a wrong name, their true name being "The Virginia and Maryland Steamboat Company;" but the error they have made in their corporate name, will make no difference, for by appearing by the name of "The Virginia and Maryland Steam Navigation Company," they admit that to be their name, and under that name the corporation is a party to the suit; and having voluntarily appeared, no objection to the decree can now be taken on account of the want of process against them.

But the strong objection to that part of the decree, which imposes the penalty on the corporation, arises from the form of the proceeding in which the decree is made. The penalty of \$500 cannot be recovered from the owners, in an admiralty proceeding by libel; the mode of proceeding, in order to recover the penalty from them, is by suit or indictment, proceeded in according to the forms of the common law; this is the mode of proceeding provided for in the eleventh section of the law of congress; and in the form adopted by the district attorney, no judgment or decree for the penalty can be obtained against the owners of the boat.

The decree of the district court is erroneous, therefore, in this respect; but, so far as it directs the sale of the vessel, the decree is correct; for the penalty for which the boat is liable, may be recovered by a proceeding *in rem* against her, without any proceeding against the owners, or any decree against them; the case of *The Palmyra*, 12 Wheat. 14, is conclusive upon this point.

The decree of the district court must, therefore, be reversed; but this court, proceeding to give such a decree as ought to have been given in the district court, will order the *Jewess* to be sold, and the proceeds brought into court, to be distributed according to law.

*John Glenn*, for appellant.

*N. Williams*, District Attorney, for appellee.

ROBERT LESLIE, appellant, *vs.* JOHN GLASS, appellee.

ROBERT LESLIE, appellant, *vs.* SAMUEL KEYSER, appellee.

In general, the party for whom a vessel is built, under contract with a shipwright, is not liable for the debts contracted by the shipwright on account of the vessel; in such cases, the contracts for work or for materials are usually made by the shipwright for himself and on his own account, in order to fulfil his agreement with the party for whom the ship is built.

Where both parties reside in Maryland, and the ship is built there, the mechanics and material men have no lien upon her.

Where the party for whom a vessel is built pays the money to the shipwright, according to his contract, he is entitled to the delivery of the vessel, and holds her free and discharged from any claim against the vessel, or against himself personally, on account of work done or materials furnished for the shipwright.

In ordinary cases of this description, general declarations made by the party for whom the vessel is built, after the work is done or the materials furnished, that he will pay all bills against the ship, will not bind him, and cannot be enforced in a court of justice.

Such promises made after the work is done, are without consideration, and cannot, on that account, be enforced in a court of justice.

But if, while the vessel is being built, the person for whom she is being built, makes advances to the shipwright beyond the sums mentioned in their contract, and takes from him an assignment of all his "right, title and interest in the vessel, as she advances in construction, together with all materials collected and to be collected for the same," and conceals the fact of such assignment, with a view to preserve the shipwright's credit, and enable him, under such false credit, to obtain work and materials for the vessel, without subjecting the assignee to responsibility for the same, this would constitute a design which a court of justice can never sanction.

The effect of such an assignment would be to divest the shipwright of all interest in the vessel; she would become from that moment the exclusive property of the assignee, not by way of mortgage, but absolutely; all the work already done upon her, as well as all that should be afterwards done, would be for his use and benefit; and all the materials already purchased, or afterwards to be purchased, became his property as soon as they were delivered.

Although the creditors, at the time the accounts were created, supposed that the shipwright still retained his interest in the vessel, and that he was dealing with them on his own account, still, all the work done, and materials furnished, after the date of the secret assignment, were for the use of the assignee alone, and justice requires that he should pay the value of

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them ; and this constituted a sufficient and valuable consideration to support his promise to pay.

Since, by virtue of the transfer, the assignee obtained all the materials which had been already bought, whether worked up or not, and also the benefit of all the labor which had been already bestowed upon the vessel, there existed a sufficient consideration, in relation to the antecedent portions of the work and materials, as well as the subsequent.

The taking of certain bills receivable, or his own note, from the shipwright, by one of the creditors, while in ignorance of the secret transfer, would not impair his right to proceed against the assignee, in the event of the security so taken turning out to be worthless.

The extent of the shipwright's property in the vessel before the assignment, cannot affect the principle upon which the case is to be decided, if he had an interest to any extent ; whatever that interest was, it passed out of him by the assignment, and the vessel, as she advanced in construction, and the materials were collected for her, became the exclusive property of the assignee, and the shipwright had no longer that interest in them which would have belonged to him by his original contract.

Circuit Court, April Term, 1840. Appeals from the District Court, in Admiralty.

The libels in these cases were filed, the one on the 31st of January, and the other on the 25th of February 1839, to recover the value of labor and materials furnished the ship *Scotia*, between the months of April 1838 and January 1839.

The defendant, Leslie, in each case, answered the libel, and denied that he ever requested or contracted with the libellant to furnish any materials or do any work, for or upon, or in anywise concerning said ship, since he became the owner of her, or at any time before ; and he stated that he entered into a contract with William F. Smith, under which, as would thereby appear, said Smith was bound to build and furnish, and deliver to him a vessel, as therein specified ; and the respondent exhibited, as part of his answer, the said contract ; in pursuance whereof, said Smith did build the vessel, and did receive payment for her from respondent, and had even received a larger

*Leslie v. Glass.*

amount from respondent than was payable for her, and was now liable for the excess to the respondent.

In his answer to the libel filed by Glass, Leslie also suggested to the court, that it appeared by the contract between Smith and himself, that the libellant was surety for Smith's performance thereof, and for saving respondent harmless in the premises, and so answerable for any default of Smith by which respondent might suffer; as must be the case, if said libellant could be entitled to recover in the present cause.

The contract exhibited with the answers, was between Robert Leslie, of the first part, and William F. Smith, of the second part, and, after setting forth in detail the mode in which the vessel was to be built, it proceeded as follows:

The contractor on the first part (Leslie) engaging to pay for the same, at the rate of \$38 per ton, Baltimore carpenters' measurement, in the following payments, viz:—\$1000 on the 23d of May (1838), \$1500 on the 1st of June, and \$2000 on the 1st of each month till November; the balance in two notes at four and six months from the delivery of the certificate. The ship to be launched on or before the 1st day of December 1838, and to be built under the inspection of the contractor on the first part; each party furnishing security for the faithful performance of this contract.

In witness whereof, we hereunto set our hands and seals, the day and year above named.

WILLIAM F. SMITH, [SEAL.]

ROBERT LESLIE, [SEAL.]

Witness: C. W. MEYER.

We, the undersigned, do hereby guarantee the performance of the above contract on the part of William F. Smith.

GEO. A. V. SPRECKELSEN,  
JNO. GLASS.

*Leslie v. Glass.*

We, the undersigned, do hereby guarantee the performance of the above contract on the part of Robert Leslie.  
(Not signed.)

A decree was passed by the district court in favor of the libellant, in both cases, and appeals were taken to this court. The evidence will appear from the opinion of the court.

TANEY, C. J. These two cases have come before the circuit court upon appeals from the district court. They arose upon libels filed to recover money, which the respective libellants alleged to be due to them for work and labor done upon the ship *Scotia*, or for materials found for her construction, at the request of Leslie. The district court, in each of the cases, decreed in favor of the libellants, and from these decrees, Leslie has appealed to this court. The causes depend upon the same principles, and the decision of one must determine the other.

The case first in order is that of *Leslie v. Glass*, in which the appellee obtained a decree in the district court for the sum of \$757 12, with interest thereon from the 25th day of February 1839, together with the costs of suit.

It appeared from the testimony, that on the 23d of May 1838, at the city of Baltimore, a contract in writing was made between the said Leslie and a certain W. F. Smith, master shipwright of the said city, whereby Smith, for the consideration therein mentioned, engaged to build for Leslie, a ship of the dimensions and kind particularly described in the said agreement. In consideration whereof, Leslie agreed to pay Smith \$38 per ton, carpenters' measure: \$1000 on the day of the date of the contract; \$1500 on the first of June following, and \$2000 on the first of each succeeding month, till the 1st of November; and the balance in two notes at four and six months from the de-

livery of the certificate by Smith and Leslie; the ship to be finished on or before the 1st of December 1838.

The evidence shows, that although Smith had built smaller vessels, yet, he had never built a *ship*, when he undertook the *Scotia*; and Leslie was aware of that fact. The usual price for a vessel of the description of the *Scotia*, at the time of the contract was about — dollars per ton, and the sum agreed on by Smith of \$38 per ton, was below the usual price. He did not, it seems, engage in the work with an expectation of making money by it, but he hoped to be able to save himself, and his main object was, to obtain for himself the character of a first-rate ship builder, by constructing this ship of the best materials and in a superior manner. Leslie appears to have been sensible of Smith's object, and that the price mentioned in the agreement was a low one, and at the time the written contract was signed, he promised Smith, verbally, to pay him a half a dollar per ton more than the writing called for. The ship was built under the inspection of Leslie, and the work done in the best manner and of the best materials.

The libellant, Glass, was one of Smith's sureties to Leslie for the fulfilment of his contract. Upon the face of the paper, it would seem, that he signed it after Spreckelsen, the other surety; and Spreckelsen, as has been proved and admitted, signed as surety at the request of Leslie, in order that he might exercise an influence over Smith in urging on the work, but under an express agreement on the part of Leslie, that he would in no event hold him liable as surety.

It appears also, that after the contract was signed, an alteration was made in the plan of the ship by Leslie, and assented to by Smith. She was made longer and deeper than the written contract called for, and her breadth of beam was not increased. This alteration was in some degree disadvantageous to Smith, and made the construction of the vessel somewhat more expensive in proportion to



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her tonnage, than the plan set forth in the written contract. The sureties do not appear to have been consulted in relation to this change of plan, nor to have assented to it.

The keel was laid soon after the contract was made; but as early as July the 3d, the confidence of Leslie in the ability of Smith to fulfil his agreement appears to have been shaken, and being, on that day, called on by Smith for an advance of money, beyond the amount he was entitled to under the contract, he took from him the following assignment:

Received, Baltimore, July 3d, 1838, from Robert Leslie, the sum of one thousand dollars, on account of new ship building by me, as per contract; and I hereby assign over to Robert Leslie, all right and title to said ship, as she advances in construction, together with all materials collected and to be collected for the same.

WILLIAM F. SMITH.

This assignment was kept secret, and was not known to the sureties of Smith, or any one employed in working upon the ship, or in furnishing materials for her, until Smith stopped payment, as hereinafter mentioned. The work went on, after this assignment, as it did before, and Leslie continued to advance money, from time to time, in order to enable Smith to carry it on. The ship was launched about the 1st of January, which was one month later than the time stipulated in the contract; she was finished four or five weeks after the launch, and measured about five hundred and forty tons.

The difficulties of Smith continued to increase from the time of the assignment above-mentioned; but he entertained hopes of being able to complete the ship, and to pay those who had credited him, until about the time of the launch, relying, as he states, upon the verbal promise of Leslie, that he should not lose by this contract. But

about the time last mentioned, a note, which he had given for materials furnished for the vessel, fell due, which he was unable to take up, and applied to Leslie for assistance; Leslie, however, refused to advance any further, and Smith thereupon was obliged to stop payment, because insolvent, and was unable to go on with the work; and much more money was, at that time, due to the mechanics and material men, than was due from Leslie under his written contract.

The ship was launched about the 1st of January, and the situation of Smith having then become public, those who had worked upon the ship, or furnished materials for her, and whose bills were yet unpaid, became uneasy and applied to Leslie upon the subject. He assured those who called on him that he would pay all just bills against the ship; and in various conversations with other persons who were not interested in their claims, he repeatedly declared that all just bills against the ship should be paid, and requested one of those persons to make the statement known, and to defend him, if he heard any report imputing to him a contrary intention. In a conversation with a clerk of Smith, the day before the ship was launched, he said, that he had agreed to pay all the bills against the ship, but he would pay nothing more until the ship was launched. It appeared from the evidence, that Smith had applied all the money he received from Leslie toward the construction of the ship and the purchase of materials for her.

The libellant Glass was employed by Smith to do the outside joiners' work. It was all done after the assignment hereinbefore mentioned, according to the testimony, and a small portion of it, after the ship was launched, and after the assurances above-mentioned had been given by Leslie, and had become publicly known among the persons engaged upon the ship. About the month of January, after the ship had been launched, certain bills receivable were transferred to Glass by Smith; but they do not appear to have been on account of the present claim, although there

is some controversy on that point; the bills could not be collected, and were returned by Glass to Smith.

Since the ship has been completed, Leslie has refused to pay these libellants and others who worked upon the ship, on the ground that the credit was given to Smith, and not to him; and the question is: Is the libellant entitled to recover the amount from Leslie? In general, the party for whom a vessel is built, under contract like the one now before the court, is certainly not liable for the debts contracted by the shipwright. In such cases, the contracts for work or for materials, are usually made by the shipwright for himself and on his own account, in order to fulfil his agreement with the party for whom the ship is built. Where both these parties reside in Maryland, and the ship is built in this district (as is the case with the parties and the vessel now before the court), the mechanics and material men have no lien upon her; and where the party for whom she is built, pays the money to the shipwright, according to his contract, he is entitled to the delivery of the vessel, and holds her free and discharged from any claim against the vessel, or against himself personally, on account of work done or materials furnished for the shipwright. The mechanics and material men have no equity against the party for whom the ship is built, under such a contract; the credit is not given to him by the mechanics or material men, but to the shipwright who employs them, or with whom they deal.

In ordinary cases of this description also, general declarations, made by the party for whom the vessel is built, after the work is done, or the materials furnished, that he will pay all bills against the ship, will not bind him, and cannot be enforced in a court of justice. And this is the case, even if the vessel turns out to be worth much more money than the party paid for building her; and although the shipwright sinks money on his contract, and becomes insolvent and unable to pay the workmen and material men; for, as there is no lien on the vessel, and the work is

done for the benefit of the shipwright, and the credit is given to him alone, the party who has fulfilled his contract with him, and thereby become the exclusive owner of the vessel, is under no obligation, legal or moral, to pay the mechanics or material men, whom the shipwright employed in his own work upon the ship. Consequently, any promises made by this party, after the work is done, are without consideration, and cannot, on this account, be enforced in a court of justice.

But the case before the court is a very different one from the ordinary contracts under which vessels are built. The evidence shows that, within a month after the ship was begun, Smith became involved in difficulties, and was unable to go on with the work, without advances from Leslie greater than those mentioned in the contract; when Smith's situation became known to Leslie, and he was called upon, early in July, to make those advances, it is evident, that he lost confidence in Smith's ability to comply with his engagement, and to secure himself, took from him the comprehensive assignment hereinbefore mentioned. Now, it cannot be doubted, that if this assignment had become known to the workmen employed upon the vessel, and to the persons from whom Smith was procuring materials, that they, too, would have lost confidence in the ability of Smith to comply with his contracts, and would have required something more than his mere personal responsibility, before they bestowed their labor upon or sold materials for a ship, in which Leslie had acquired the exclusive interest, and in which Smith had no longer any title.

The motive for keeping secret this assignment cannot be mistaken; it was to preserve Smith's credit, and by that means to enable him to go on with the ship. This concealment gave him a false credit, and if Leslie intended by that means to obtain, upon the credit of Smith, the labor and materials necessary to build the ship, without becoming personally responsible himself, it was a design

which a court of justice can never sanction; for, in this aspect of the case, what is the result? Leslie knew Smith's difficulties, and to secure himself, had taken an assignment of the whole interest of Smith in the ship, "as she advanced in construction, together with all the materials collected, and to be collected, for the same." After this comprehensive transfer was made, the men who furnished materials, and the men who worked on the ship, were still left to suppose that Smith's property in the vessel remained unchanged, and Leslie well knew that they were dealing with him under that impression; and yet every plank that was nailed upon the ship, became immediately the property of Leslie, as well as every pound of iron or other material furnished for the ship. These things were all, in fact, procured by Smith for Leslie's use, and if Leslie did not intend to become responsible for them, and designed to avail himself, in this way, of the false credit which the concealment of the transfer above-mentioned gave to Smith, such conduct on his part would have been a fraud upon the creditors. And if he could establish by proof that he took the assignment, intending not to be responsible for the necessary expenses of building the ship, of which he had then become the exclusive owner, it would not strengthen his defence. He would be made responsible for the benefits he had received by the false credit, which his concealment of the assignment would have given to Smith.

But it would hardly be just to the appellant, to decide the case upon this ground. The court is satisfied, that at the time the contract was made, he supposed that Smith would be able to make some money by it; and when he took the assignment to secure himself, he supposed that the cost of the ship would not very far exceed the amount mentioned in the contract, and believed it would be for the advantage of Smith, as well as himself, to sustain Smith's credit, by concealing the assignment until the work was finished. The excess of the cost over the sum anticipated, appears to have been much larger than he expected; and the ship

was hardly finished, when, notwithstanding his assurances that the bill should be paid, one of these libels was filed against him. I am persuaded, from a view of the whole evidence, that the present defence is owing more to the irritation occasioned by these circumstances, than to any deliberate design to break the promises he had made, or to be unjust to the creditors.

But however this may be, the legal effect of the assignment was to divest Smith of all interest in the vessel; she became, from that moment, the exclusive property of Leslie; all the work already done upon her, as well as all that should be afterwards done, was for his use and benefit; and all the materials already purchased, or afterwards to be purchased, became his property as soon as they were delivered. From the time of the transfer, therefore, Smith was nothing more than Leslie's agent, managing Leslie's property for him. The assignment was not a mere mortgage, as has been argued, but an absolute transfer, and Leslie had a right, under it, to select the materials to be bought for the ship, and to designate the workmen to be employed, and to agree on the prices to be paid; and whether he exercised this power in his own person, or allowed Smith to act for him, is not material to the present question. In either case, Leslie was, in substance, the principal and Smith the agent, after this assignment, and the work afterwards done, and the materials afterwards bought, were exclusively for Leslie's use.

This being the case, the promises afterwards made by Leslie, are by no means promises without consideration. It is true, that the creditors, at the time the accounts were created, supposed that Smith still retained his interest in the vessel, and believed that he was dealing with them on his own account; but it turns out that Smith had no property in the ship after the third of July, and that all of the work done and materials furnished after that time were for the use of Leslie alone; and as Leslie has received all the benefit of this labor and of these materials, justice requires

that he should pay the value of them; and they are a sufficient and a valuable consideration to support the promises he afterwards made.

It has been argued, that a portion of the libellant's claim arose before the transfer of the ship and materials to Leslie, and stand upon different principles from that part of it which accrued afterwards. But assuming this to be the fact, yet, Leslie admitted the right of the libellant to the whole bill, and made no distinction in his promises and admissions between different portions of it; and since, by virtue of the transfer, he obtained all the materials which had been already brought, whether worked up or not, and also the benefit of all the labor which had been already bestowed on the ship, undoubtedly, there is a sufficient consideration, in relation to the antecedent portions of the work and materials, as well as the subsequent.

These promises appear to be nothing more than the admissions of Leslie, of the obligations imposed upon him by the original understanding between Smith and himself. When the contract was originally made, and made below the ordinary market price, Leslie assured Smith that he should lose nothing by it; he appears to have desired a first-rate ship, and he relied on Smith to build him such a one, in all respects, as he desired. And while he, very naturally, wished to do this in an economical manner, yet he had determined to spare no expense necessary to accomplish his object; hence, we find him, in the early part of July, as hereinbefore mentioned, advancing money to Smith beyond the amounts stipulated in the agreement; we find these advances carried on until the vessel was completed; and instead of giving his notes at four and six months to Smith, for a large balance, which, according to the written agreement, was expected to be still in Leslie's hands when the ship was launched, we find that he had paid, by that time, very nearly the whole amount in the agreement, and we find him actually paying a bill for copper, after the ship was finished, although the bill exceeded the small amount

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of the balance still in his hands, and due from him according to the written terms of the contract. Why should this payment have been made, unless he felt himself bound in justice to pay it? And how could he be bound to pay, unless it was procured for his use, either by himself in person or through the agency of Smith? In either case, the claim stood upon the same footing with the other bills, and if justice required him to pay this one, the same obligation exists as to the others.

The bills receivable taken from Smith, by the libellant, if taken in part payment of this account, would in no degree affect the controversy; these bills were never paid, and were returned to Smith shortly afterwards; the character of the debt, as originally due to the libellant, remained unaltered, and if Leslie was liable before this transfer, he was equally liable after these bills receivable were returned to Smith. The act of taking them, or of taking Smith's note, would only show that the parties gave the credit to Smith when the accounts were originally created, and were not aware that they had any remedy against Leslie. The fact that the credit was so originally given, is undisputed, it applies to all the accounts, and was evidently given to Smith, under the impression that the work and materials were for his benefit; for all of the workmen and material men appear to have been ignorant of the understanding between Leslie and Smith, and unacquainted with his embarrassments, and with the assignment made by him to Leslie.

I have not thought it necessary to examine into the extent of the property which Smith held in the vessel, previously to his assignment. It has been a good deal discussed in the argument; but it is admitted on all hands, that he had a property in the ship to some extent; and it can make no difference in the principle upon which this case is decided, whether that property was greater or less; whatever it was, it passed out of him by the assignment, and the vessel, as she advanced in construction, and the ma-



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terials that were collected for her, became the exclusive property of Leslie, and Smith had no longer that interest in them which would have belonged to him by his original contract.

I have entertained some doubts as to the amount charged by libellant; the testimony of Costigan is certainly strong, to show that the outside joiners' work ought not to have cost the amount charged for it; and this testimony is supported by that of Robb, who has, for a long time, been a shipwright in Baltimore, and has had much experience in that line; but it appears, that the libellant was employed by Leslie himself to do the inside joiners' work on the ship, and that Leslie settled with him upon terms precisely the same with those claimed for the outside work; that is to say, the charges in both cases is a *per diem* charge at the same rate of wages. Leslie can hardly complain of the price charged for the outside joiners' work, when he employed the same person, and at the same rate of wages, to do the inside joiners' work for the same vessel. The inside joiners' work was not, under the original contract, to be done by Smith; it is not usually done by the shipwright, but by the person for whom the vessel is built, and Leslie employed the libellant to do it.

In the answer of Leslie, he insists upon the liability of Glass to him, as one of the sureties of Smith in the written contract, as a part of his defence against this claim; but this ground has not been relied on at the trial, and it is unnecessary, therefore, to remark upon it.

The case of Keyser v. Leslie must be governed by the principles upon which the case of Glass has been decided. It is for the iron used in the construction of the ship. It is true, that all of the iron had been delivered before the declarations and promises of Leslie, hereinbefore mentioned, and some of it before the assignment; but in the view taken by this court, that circumstance does not, in any material respect, distinguish it from the case of Glass; for the right of the last-mentioned party to recover, does not depend on the

small portion of the outside joiners' work that was done after these promises were made. His right to recover, as will appear by reference to the foregoing opinion, depends on principles altogether independent of that small part of the work, and which apply in all respects, with equal force, to the claim of Keyser, and apply to the materials furnished before the assignment as well as after.

These claims are, however, cases of some hardship to Leslie; the ship has cost more than such a vessel ought to have cost, built in the best manner. It is, indeed, sufficiently established by the evidence, that Smith honestly applied the money he received for building the ship; yet, from want of experience in the construction of large vessels, or from some other cause, more money per ton has been expended upon her, than was laid out upon other larger vessels built in Baltimore about the same time; and which appear to have been, perhaps, as well built as the one in question. Nor are these libellants altogether free from blame, in suffering these accounts thus to accumulate, and to remain so long unsettled, without applying to Leslie to know Smith's situation, and also to apprise him of the accounts which Smith was suffering to accumulate, and to remain so long in arrear. If Leslie is compelled to pay the principal amount of the bills, with the interest and costs recovered against him in the district court, it is all that justice can require of him, and as much as the creditors can rightly demand. I shall therefore give neither interest nor costs in the circuit court, and shall merely affirm the decrees of the district court.

*Charles F. Mayer*, for appellant.

*Glenn and Gatchell*, for appellees.

ROBERT TAYLOR, Claimant of the STEAMBOAT BOSTON,

*vs.*

JAMES HARWOOD and OTHERS, Owners of the STEAMBOAT  
FREDERICKSBURG.

Where a witness was summoned to testify in a case in the district court, and did not attend, but no continuance was sought on that ground, and no summons was issued for his attendance in the circuit court, until five days before the case on appeal was called for trial, and his name was not called till the case was called for trial: *Held*, that his absence was no cause for a continuance.

The Court of Admiralty never suffers the substantial justice of the case to be defeated by matters of form.

If any persons have joined in a libel who are not competent to sue for the matter complained of, the circuit court, although an appellate court, will give leave to amend, and to strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits.

The admiralty court has jurisdiction in cases of collision happening upon tide-water in the Chesapeake Bay, or the rivers emptying therein; the jurisdiction has been settled by the decision of this court, and has been acted upon on several occasions, and cannot now be considered as open for argument.

The omission of a known legal duty, is such strong evidence of negligence and carelessness, that in a case of collision, where one of the vessels did not carry the light required by law, she should be held altogether in fault, unless clear and indisputable evidence be established to the contrary.

When all the witnesses are equally trustworthy, it is not by the number that the court must be governed; but rather by the means of knowledge they respectively possessed.

In an appeal from the district court, the judgment of that court is to be regarded as correct, unless the appellant can show it to be erroneous; the burden of proof is upon him. In a case involving purely a question of fact, depending upon the testimony of a multitude of witnesses, whose statements are inconsistent with each other in material and essential particulars, and whose relative title to credibility is to be carefully weighed and scrutinized, nothing but the firmest and clearest conviction that the district court has fallen into error, will justify the circuit court in reversing the judgment.

Taylor v. Harwood.

New testimony introduced in an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the district court.

Circuit Court, November Term, 1845. Appeal from the District Court, in Admiralty.

The libel was filed on the 16th of June 1845, by the appellees, owners of the Steamboat Fredericksburg, against the Steamboat Boston, to recover damages for injuries sustained by a collision in the Chesapeake Bay. Both the steamers were owned by citizens of Maryland, and were engaged in performing voyages within the limits of that state, and were within those limits at the time of the collision.

A great deal of conflicting testimony was taken in the case, the effect of which is stated in the opinion of the court. The decree of the district court was in favor of the libellants; from which decree an appeal was taken to this court.

When the case was about to be heard on the appeal, an application for a continuance was made by the appellant, on the ground of the absence of a material witness, and an affidavit filed to sustain his application. This application was refused by the court, and the following reasons assigned:

TANEY, C. J. It is admitted in this case, that the witness was summoned to the district court, but did not attend, and was not examined; he sails in a vessel, trading between this place and Havre de Grace; if he were present the party would be entitled to examine him, according to the practice of the admiralty courts. This practice, so contrary to that of chancery and common law, in cases of appeal or writ of error, can only be justified from the character and pursuits of witnesses usually required in admiralty proceedings, whose occupations most commonly

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prevent them from remaining long at one place, and often therefore make it difficult to procure their attendance at the moment they are wanted. And the same principle prohibits the court, when sitting on an appeal, from continuing the case over to another term; for, if the party might continue to seek out new testimony, and thus delay the appeal until he can get it, the appeal might never be tried; he cannot, when he appeals, crave time to make out a new case; he must come prepared with his new testimony, if he desires to use it. This has always been the decision of this court, and was so ruled several years ago.

There is this strong reason in this case to refuse the continuance, that it was not sought in the district court on account of the absence of this witness. After the disobedience of the witness to the process of that court, he ought to have been summoned earlier to this, and process of attachment prayed against him, if he did not attend; due diligence required this; but summons did not issue for him until five days ago, and he was never called until to-day. When witnesses have been examined in the district court, it is the duty of the party to have their depositions reduced to writing, if he contemplates an appeal in case of a decision against him; and if he fails to do so, and the witness does not attend upon summons, it will, in general, be no ground of continuance; because the party has not used proper diligence to procure his testimony, unless he requires his testimony to be reduced to writing in the district court. There may be a case where special circumstances of surprise upon the party, or sickness of the witness might except it out of the rule, but it must be a strong case that would induce this court to except it; because, from the nature of the greater part of cases in admiralty, the character and pursuits of the witnesses make it essential to the principles and administration of justice that appeals should be promptly heard and decided.

The appeal having been tried at this term, the following opinion was delivered by—

TANEY, C. J. The case, as presented to the circuit court, is merely a question of fact upon the testimony offered. The points of law which were raised and discussed on the trial in the district court, have been waived in this court by the counsel for the appellants; and very properly waived, for they are either unimportant to the decision of the controversy, or have been too long and too well settled, to be now open for argument. For, as to the suggestion, that some of the libellants have no interest in the Fredericksburg, and are, therefore, improperly made parties to the libel, it is not supported by the proofs, so far as any have been offered on this point; and if it had been otherwise, yet the court of admiralty never suffers the substantial justice of the case to be defeated by matters of form. If any persons had joined in the libel, who were not competent to sue for the matter complained of, this court, although it is the appellate court, would give leave to amend, and to strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits.

As regards the jurisdiction of the admiralty court, in cases of collision happening upon tide-water in the Chesapeake Bay, or the rivers emptying therein, the point was adjudged in this court, and the jurisdiction sustained, before I came upon the bench; and has since, on several occasions, been exercised, without question, so that it cannot now be considered as open for argument.

Upon the facts in controversy, a multitude of witnesses have been examined, and as almost always happens on such occasions, there is much contrariety and conflict in the testimony produced by the different parties. This difference does not generally arise from any desire to misrepresent the transaction, but from the different points of view from which it was observed, from the different times at which their attention was first called to the danger, from the different degrees of coolness and composure with which it was viewed, the different degrees of knowledge which

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the parties possess as to the management of the vessel, and perhaps, above all, to the prejudices excited on board the different boats, by the representations of those more immediately responsible, made immediately after the collision has taken place, when each one is desirous of justifying himself, and throwing the blame upon the other. But whatever may be the cause, it is evident that, in this case, any attempt to reconcile the statements of the different witnesses would be utterly hopeless, and the court must proceed to decide the case according to the weight of the testimony, and the degree of credit to which, under all the circumstances, it thinks the respective witnesses are entitled.

It is unnecessary, in this opinion, to enter into a detailed examination of the various statements made by the different witnesses; indeed, such an examination would fill a volume. It is sufficient to say, that after a careful and minute analysis of the whole testimony, and deliberately considering the arguments of the counsel for the respective parties, I have come to the following conclusions:

1. That the Boston ran into the Fredericksburg nearly stem on, striking the Fredericksburg on her starboard bow, and causing the injuries complained of. I think this conclusion inevitable, not only from the marks on the bow of the Fredericksburg, so frequently spoken of and described by the witnesses, but also from the nature of the injuries sustained by the canal-boats, which the two steamboats had in tow at the time. Each of the steamboats had two canal-boats on each side, and the canal-boats, of course, headed precisely in the same direction with the steamboats to which they were attached; when the collision took place, the outer canal-boat, on the side of the Boston, had her stem broken, and the planks and timbers of her bows forced open, so that she was in danger of sinking, and so directly upon her stem was the blow given, that the fastenings which bound her to the inner boat were broken, and she drifted away and did not press the inner boat

against the side of the Boston; the head of the inner boat was also injured, but not so much as the outer one. But the outer boat on the starboard side of the Fredericksburg, had, in the language of the witness, "her side knocked in, her bow deck knocked over and jammed off, and her stern-post broken, and one of her timber-heads;" and she was pressed so forcibly against the inner canal-boat, that the latter was driven under the wheel of the Fredericksburg, where it became so fastened that it required some time and exertion to release it, when the collision was over, and the steamboats had separated. These circumstances, about which there is no dispute, and no conflict in the testimony, show that the Boston came into collision head on; and they confirm the testimony of Campbell, the pilot of the Fredericksburg, who was then at the helm, who stated that the canal-boats at the side of the Fredericksburg were first struck, and that the Boston then glanced off and struck the blow on the bow described by the witnesses; he is also confirmed by the testimony of Worthington, a passenger on board, who swears that there were two shocks from the collision, one rapidly succeeding the other; and he mentions circumstances which show that, in this matter, he cannot have been mistaken.

2. It is also established by the testimony, that when they came so near as to render the collision inevitable, unless the course of the boats was changed, the pilot caused the engine of the Fredericksburg to be stopped, and putting his helm hard to starboard, the vessel was falling off to the larboard side at the moment she was struck; but on the part of the Boston, the engine was not stopped, until she actually struck, and no effort appears to have been made to check her speed or lighten the blow.

3. When the two boats came in sight of each other, the Fredericksburg had just turned Locust Point, and the Boston, Sandy Beach, being the two opposite ends of the Shesutie Island. The weather was rough, and the Fredericksburg being a small boat, with five canal-boats in tow,



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it was deemed necessary, or at all events prudent, to keep her head to wind, which was adverse to her; and this directed her course further out from the island, and nearer to the eastern shore, than she would have pursued with more favorable weather. When she was first seen by the Boston, the latter was heading north-by-west, which is the ordinary and proper course up the bay along Shesutic Island, when a boat is bound for Havre de Grace; but after the course of the Fredericksburg was observed, and she was seen standing more over towards the eastern land than usual, the Boston changed her course from north-by-west to north-by-east, and continued afterwards to bear more and more to the eastward, until she was heading about E. N. E., when the collision took place; and had, by the admission of her own commander at the time, gone at least two miles out of her ordinary and appropriate course.

The excuse offered for this otherwise unaccountable proceeding of the Boston, is, that it is the established usage with steamboats to go to the right when they are meeting one another; and moreover, that there was an agreement to that effect between the owners of these boats, and that the changes in the course of the boat, and the deviations from the usual track, were made in order to execute that agreement. But it is impossible to give such a construction to the agreement, or to the maritime usage, as would justify the course pursued by the Boston. The meaning of the contract and the maritime usage upon the subject, are precisely the same, that is to say, if two boats are meeting each other, each shall veer to the right to avoid collision; but when the course of the Fredericksburg was making a considerable angle with the line on which the Boston was at first proceeding, and which was, moreover, the ordinary and proper course of the Boston, and when, from the direction the Fredericksburg was steering, she was every moment increasing her distance from the path in which the Boston was expected to pass, there is no maritime usage, and no reasonable construction of the

contract mentioned in the testimony, that can excuse the commander of the Boston from deviating six or seven points from his usual and proper course, and going two miles out of his way, in order to cross the bow of the Fredericksburg, and pass her on her larboard side; the more especially, as every change of course most obviously and necessarily increased the danger of coming into collision. I think the conduct of the Boston in this matter to be altogether inexcusable.

4. But what appears to me to remove all doubt upon the question of who was in fault, is the want of the signal-light on board the Boston, which the law requires to be carried from sunset to sunrise. This light, on board the Fredericksburg, was in proper order and in its proper place; but on board the Boston, at the moment the Fredericksburg came in sight, it was found to be flickering only, or nearly out, and was immediately taken away, and was not replaced during the whole time the boats were nearing one another, nor until after the collision had actually taken place. It is true, that another light, said to have been a strong one, was burning under the upper deck near the machinery, which, it is stated in the testimony, might have been seen on board the Fredericksburg; but this was not the signal-light prescribed by law, which, by universal usage, is placed in an elevated position at the head of the vessel; and in this position the Boston herself was accustomed to bear it.

Experienced commanders of steamboats have testified, that the light thus placed enables you to determine not only the place of the boat but the course she is steering. But however that may be, the duty is enjoined by law; and the omission of a known legal duty is such strong evidence of negligence and carelessness, that, in every case of collision happening under such circumstances, I should hold the offending vessel as altogether in fault, unless clear and indisputable evidence established the contrary. Certainly, in this case, no such evidence has been offered in

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behalf of the Boston, as can vindicate her from the presumptions of carelessness and negligence, which justly arise from her disregard of a legal duty, and that, too, at a time when the boats were approaching one another, and the signal-light particularly important.

Upon these considerations, I am decidedly of opinion, that the entire fault was on the part of the Boston, and that she is justly chargeable with the damage done to the boat of the libellants.

The remaining question is, upon the amount of damage, and upon this point there is nearly as much contrariety in the statements of the witnesses, as there was upon the point already disposed of. The witnesses, too, are all skilful workmen, respectable citizens, and of undoubted integrity and truth. The greater number of them estimate the damage far below the amount awarded by the district court. But when all are trustworthy, it is not by the number that the court must be governed, but rather by the means of knowledge they respectively possessed, and their previous knowledge of the boat; the time when the examination was made, and the manner of it, also, must be chiefly regarded. For, it is evident, that a single witness who made the examination soon after the disaster happened, when the marks of the injury were yet fresh, who made his examination in detail, and by items estimating the cost of repairing each particular injury, and who had had opportunities of being well acquainted with the previous condition of the boat, is more to be relied on than the testimony of many witnesses who had made only general examinations and general estimates, and that, too, long after the injury was received, and when she had been lying for months dismantled and exposed to the weather. And in this view of the subject, I adopt the estimate of Mr. Brown, who is admitted on all hands to be a man of undoubted skill and unquestionable character, and who had the best opportunity of knowing the condition of the boat previously to the collision, who examined her immediately

after the injury was done ; whose examination was made in detail, with separate estimates of the cost of repairing the several specific injuries which the vessel had sustained, and with those injuries immediately before him when he made his estimates. The estimates of Mr. Brown were adopted by the district court; and, I think, rightly adopted.

So far I have treated this case as if it were a new one, coming as an original cause before this court, without any previous examination or decision. But this is not the point of view in which the court regards it; it is an appeal from the district court; and the judgment of that court is to be regarded as correct, unless the appellant can show it to be erroneous; the burden of proof is upon him. In a case like this, which is purely a question of fact, depending upon the testimony of a multitude of witnesses, whose statements are often inconsistent with each other in material and essential particulars, and whose relative title to credibility is to be carefully weighed and scrutinized, nothing less than the firmest and clearest conviction that the district court had fallen into error, could justify this court in reversing its judgment; and the more especially when, as in this case, it appears from the written opinion filed by the judge, that the whole case was most carefully and elaborately considered and decided in that court.

It is true, that some new testimony has been offered here, which was not given in the district court. But new testimony introduced into an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the district court; as it is always liable to the imputation of having been sought for in order to meet the new condition of the controversy, arising from the decree of the district court, and is, moreover, calculated to take the opposite party by surprise, in the court of last resort. But I do not perceive that the new testimony, in any view,

is entitled to much weight, or can materially change the aspect of the case, as it was presented to the district court; for, as to the two new witnesses, who testified concerning the collision, and were particularly referred to in the argument, Captain Brown saw nothing, until after the collision had actually taken place, and the vessels were endeavoring to disengage themselves from each other, and then his stay upon deck was only for a few minutes; and according to his own account, even while there, he took very little interest in the matter, and bestowed upon it but little attention; and as relates to Mr. Allison, he was on board of his own vessel, lying under Shesutie Island, about two miles distant from the place of collision, and, of course, very little able to determine on the course and management of the boats, as they approached one another, especially as one of them had no bow-light. The notion which he seemed to entertain, that the Fredericksburg was pursuing the Boston, and changing her course in order to meet her, is inconsistent with the weight of testimony hereinbefore considered, and inconsistent, too, with the strongest motives which, in ordinary cases, govern human actions; for the Fredericksburg being so much smaller and weaker than the Boston, it can hardly be believed, that it sought a collision, which must inevitably end in disaster to their boat, and put in jeopardy the lives of those on board.

As respects the new testimony in relation to the amount of damage, I have already expressed my opinion upon it, and of the degree of weight to which it is entitled in comparison with that of Mr. Brown; that these same witnesses were not examined in the district court, and if the testimony was regarded as material at that time, it was in the power of the appellant to have brought it forward. It must be a very strong case, and the omission to examine must appear to have arisen from some sufficient and peculiar circumstance, before the circuit court would reverse an assessment of damages made by the district court, where both parties consented to try the question

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upon the testimony then offered, without producing other testimony then in their power. Upon the whole, I see no ground upon which to question the correctness of the decree of the district court; and affirm its decree, with costs.

*George M. Gill*, for appellant.

*J. Mason Campbell*, for appellees.

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PETER MITCHELL

vs.

TIMOTHY PRATT.

A paper, purporting to be a receipt by a seaman to the master of his vessel, for twenty-five cents, "for assault and battery, in full of all dues and demands," with a witness's name to it, and on which are two wafer seals (in the absence of proof that either of the seals is that of the person giving the receipt), cannot operate as a release, in the technical sense of that word, as known to the common law.

Such receipt may operate as an acquittance, given upon the compromise and settlement of an unliquidated and disputed claim for damages for the assault, if the settlement was fairly made, when the seaman was free from improper influence, and had an opportunity of exercising his free and deliberate judgment.

But in order to entitle it to support, it must appear to be a reasonable satisfaction, or, at least, the contrary must not appear.

Circuit Court, April Term, 1841. Appeal from the District, Court in Admiralty.

TANEY, C. J. This is an appeal from the decree of the district court, dismissing a libel filed by the appellant to recover damages from the appellee for an assault and battery.

The appellant shipped as a seaman on board the schooner David Pratt, whereof Timothy Pratt was master, on the 9th of September 1840, at Portland, for a voyage to Turk's Island, and one more port in the West Indies, if required

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by the master, and back to the United States, and to Portland, if required by the master. It appears, that on the voyage to Turk's Island, the master, without any justifiable cause, struck the libellant a severe blow on the head, with an iron-bound water-bucket, which broke to pieces by the force of the blow, and afterwards beat him with a broom-stick, until he broke that also, and then with his fists. The schooner made the voyage to Turk's Island, and returned from thence to the port of Baltimore, where the libellant was discharged by the master, at his own request. At the time of his discharge, he received the balance due him for his wages, which were paid him in the cabin of the vessel, in the presence of the mate, and he signed the printed receipt endorsed on the shipping articles, which contains the usual release of all demands for assault and battery or imprisonment, and every other matter whatever.

It is stated by the mate, Barzillai Curtis, examined as a witness for the respondent, that after this receipt was signed, the master said to the libellant, that there was some little difficulty between them, and that he would give him twenty-five cents to settle it, which he took, and receipted the paper filed by the respondent, which he (the mate) witnessed. The receipt produced is in the following words:

“Baltimore, Oct. 27, 1840.

“Received of T. Pratt, twenty-five cents for assault and battery, in full for all dues and demands.

<sup>his</sup>  
PETER + MICKELL. [SEAL.]  
mark.

Witness:—BARZILLAI CURTIS. [SEAL.]”

This receipt, it appears by the testimony of the mate, was signed about ten minutes after the wages had been paid and the receipt given on the shipping articles; that there was nothing said particularly about the assault and battery, at the time; that the respondent said he would give him twenty-five cents to satisfy him, but that there

was no compulsion, and that he need not sign the receipt and take the money unless he pleased. Another seaman, named Jesse White, is said to have been present at the settlement, but he has not been called as a witness by either party.

This is the case upon the evidence, and it is very clear, that an assault and battery was committed by the master upon the libellant, and that the blow inflicted and the weapon used were altogether unjustifiable. This, indeed, is not controverted in the argument; the defence relied upon, is the settlement and receipt above mentioned; and it is insisted upon the part of the respondent, that this settlement and receipt is a full answer to the libellant's demand.

It is evident, that the paper in question, cannot operate as a release, in the technical sense of that word, as known to the common law; for, although there are two wafer seals upon the paper, there is no proof that either of them is the seal of the libellant, or that either of them was on the paper at the time it was executed. It must be remembered, that the proof offered, is by the subscribing witness, who was called by the respondent to prove the execution of the paper; he says, that the libellant "receipted the paper," and this is all the proof he gives of its execution; not a word is said in relation to the sealing of the instrument; nor anything said from which it can be inferred that it was sealed by the seaman. Moreover, it contains no words of release; nor any words that can be construed as such.

The court, however, does not understand that the paper is relied on as a release, in the common law sense of the word, but as an acquittance given upon the compromise and settlement of an unliquidated and disputed claim for damages for the assault. And I do not doubt that, if this settlement was fairly made, when the seaman was free from improper influence, and had an opportunity of exercising his free and deliberate judgment, it ought to be supported;



but in order to entitle it to support, it must (in the language of the court, in the case of *Cumber v. Wane*, 1 Strange 426), "appear to be a reasonable satisfaction, or, at least, the contrary must not appear." And in this view of the matter, it is of no importance whether this paper be regarded as a release, or merely as a receipt, for it certainly cannot be supported, in either case, if it appears to have been obtained unfairly, or by improper influence.

It appears to the court, that there are insuperable objections to this paper, as a bar to the seaman's suit. In the first place, the amount stated to have been given in satisfaction, is obviously and grossly inadequate, and does not approach at all to a reasonable satisfaction; and in the second place, the paper was obtained under circumstances in which the sailor was evidently within the reach of undue influences, which he could hardly be expected to resist.

The sum given as an award and satisfaction, is merely a nominal one, and could have formed no real consideration in the mind of the parties; and upon principles of justice, this receipt has nothing more to recommend it, as a discharge to the respondent, than the usual printed receipt and release endorsed on the shipping articles. Yet, that acquittance, although it contains express words of release, is not held to be sufficient to discharge the master from damages for an assault and battery or imprisonment, without some further proof; because the relations which have been existing between the parties, the power of withholding the seaman's wages, and his inability, in general, to read and comprehend the legal effect of such instruments, give great advantages to the master over him, and bring just suspicion upon any contract of settlement and compromise between them, which, upon the face of it, shall show that the seaman was legally and equitably entitled to more than he received.

Now, the receipt in question is not only liable to the same objections with the printed acquittance above men-

tioned, but to a greater and more serious one. In ordinary cases, when the printed acquittance is signed, the voyage is ended, and the seaman entitled to his discharge, and he is, at least, free from the apprehension of personal ill-treatment by the master. It is true, that in this case, also, the libel states the voyage to be ended; but this is the error of the pleader; and according to the shipping articles, the seamen were not entitled to their wages here, if the master chose to require them to proceed from this place to Portland.

The case, then, upon the receipt relied on, is this. The libellant requests his discharge here, as proved by the mate (the master being at liberty to discharge him or not, as he pleases); the seaman is thereupon taken to the cabin and receives the balance of his wages, in the presence of the master and mate, to whose authority he has been accustomed to submit; and at the same interview, when he does not appear to have received any written or other discharge, which released him from the shipping articles, and when it was still in the master's power to compel him to continue with the vessel to Portland, he is desired to sign another paper, by which he relinquishes his claim for damages for a severe and unjustifiable battery, upon terms so utterly unjust to him, that it is impossible to believe that he could have assented to them, if he had felt himself entirely free, and understood the meaning of the paper. He was told, indeed, there was no compulsion, and that he need not sign the paper unless he pleased. But what would have been the consequences, if he had determined not to sign it? The seaman must have felt that his request to be discharged here, might, in that event, not be complied with, and that the master might compel him to perform the voyage to Portland. He was, at all events, in the power of the master in this respect, and he was not free and upon equal ground with him until he had received a legal and irrevocable discharge, and had left the vessel.

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It does not appear that any discharge was given before the receipt was signed; he was on board the schooner and in the master's power, and the sum paid is so grossly inadequate, that the court is satisfied the acquittance must have been given under a sense of coercion, if the seaman understood its contents; and it cannot, under such circumstances, be supported as a bar to his claim.

The decree of the district court must, therefore, be reversed, and the court will award the libellant thirty dollars damages; but no costs in the circuit or district courts can be given, under the act of congress, as the damages recovered are under fifty dollars in this court.

*Vide:* Harden v. Gordon et al., 2 Mason 541; Thomas v. Lane, 2 Sumner 1; Thompson v. Faussat, Pet. C. C. 182; Phillips v. The Scattergood, Gilpin 5.

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#### IN THE CASE OF THE CLERK'S FEES.

The third section of the act of congress of 28th February 1799, among other things, declares that "in case a clerk of a court of the United States perform any duty for which the laws of the state make no provision, the court in which such service shall be performed, shall make a reasonable compensation therefor:" *Held,*

1. That in order to determine what is a reasonable compensation, the court must look to what the law allows in similar cases.
2. That whatever the legislature allows to the officer in any case, it must be supposed, they considered a reasonable compensation, and meant a compensation at the same rate, when they referred it to the court to make a reasonable allowance.
3. That acting upon this principle, the fees allowed in the case of a seizure of goods in a river or creek, for a breach of the revenue laws, would seem to furnish the true rule of compensation to the clerk, in the case of a seizure upon land, for a similar breach of the revenue laws.
4. That as in cases of seizure within the admiralty jurisdiction, the clerk is, by the act of 18th April 1814, allowed one-half of one per cent. commission on the money deposited in court, the same allowance may be deemed reasonable, in cases of seizure made upon land, where the

## Case of the Clerk's Fees.

property seized has been condemned as forfeited and sold, and the proceeds brought into court.

*Quere ?* Whether the act of 1814 is confined to admiralty cases, or extends to others.

Circuit Court, April Term, 1841.

TANEY, C. J. In this case, a seizure has been made, on land, of goods to a large amount, for a breach of the revenue laws, and the goods seized have been condemned as forfeited and sold, and the proceeds brought into court to be distributed, after the payment of costs, according to law. A question has arisen as to a portion of the costs charged by the clerk; he claims one-half of one per cent., upon the amount of money deposited in court.

If the seizure had been made upon water, within the jurisdiction of the admiralty court, the clerk would undoubtedly be entitled to the commission he claims. The act of congress of 1st March 1793 (1 Stat. 332) gave him one and a quarter per cent. on all money deposited in court, in admiralty and maritime cases; the act of 28th February 1799, § 3 (1 Stat. 625), confirms the provision made in the act of 1793; and the act of 18th April 1814 (3 Stat. 133), reduces the commission allowed by the above-mentioned laws to one-half of one per cent.; so that, if this were a seizure within the limits of the admiralty jurisdiction, there could be no question as to the proper fee to be allowed.

Some doubt, however, has been entertained as to the construction of the act of 1814, in relation to cases not within the admiralty jurisdiction; and it is suggested, that its only purpose was to lessen the fees before allowed in admiralty and maritime cases, and not to give compensation where none had before been provided. But from the rule upon that subject adopted by this court, in December 1826, it appears, that a contrary opinion was, at that time, entertained; and it was held, that the statute not only lessened the fees in this respect, in admiralty and maritime

## Case of the Clerk's Fees.

cases, but also gave the commission thereby allowed in such cases, that is, one-half of one per centum, in all cases where money was deposited in court, whether they were of admiralty jurisdiction or not.

It is not, however, necessary, in determining the present question, to decide upon the construction of the act of 1814; the point before us can be satisfactorily disposed of, under the third section of the act of 1799, giving either of the constructions above mentioned to the act of 1814.

The third section of the act of 1799, among other things, declares that in case the clerk performs any duty for which the laws of the state make no provision, the court in which such service may be performed, shall make a reasonable compensation therefor. Now, there can be no seizures in the state courts, in cases like this, and consequently, no money paid into court upon such a proceeding; the state law, therefore, cannot furnish the rate of compensation, according to the section of the act of 1799, above mentioned, but this court is required to make a reasonable compensation.

In order to determine what is a reasonable compensation, we must look to what the law allows in similar cases; for, whatever the legislature allows to the officer in any case, we are bound to suppose they consider a reasonable compensation, and mean a compensation, at the same rate, when they refer it to the court to make a reasonable allowance.

Acting upon this principle, the fees allowed in the case of a seizure in a river or creek, for a similar breach of the revenue laws, would seem to furnish the true rule of compensation. The proceedings are in all respects alike; the object is the same, and the same tribunal exercises jurisdiction. There can be no good reason for making a different rate of fees, or allowing a different commission to the clerk, merely because the goods are seized on land, instead of the water; when the proceeding is the same in every respect. And as it is admitted, on all hands, that the

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clerk is entitled to one-half of one per cent. upon money deposited, in cases of admiralty and maritime jurisdiction, the same may be deemed reasonable in the case before us.

In this view of the matter, it is immaterial whether the act of 1814 is confined to admiralty cases, or extends to others. Upon either construction, the clerk is entitled to the fees he now claims.

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FRANCIS JONES, surviving partner of JOHN CRAIG,

*vs.*

The BRIG RATLER, and CHARLES S. OAKLEY and EDWARD ROOME, Claimants.

On a libel against a vessel owned by residents of New York, and against her owners, for materials furnished such vessel at the city of Baltimore, partly before, and partly after she came into their possession: *Held*, that as the vessel was previously owned by a resident of Baltimore, the materials furnished her, whilst so owned, were no lien.

But materials furnished after the change of ownership, at the request of the master and former owner, under whose charge the vessel was fitted out, were a lien upon her, unless it be shown that they were furnished on credit of the master.

And the burden of proof as to this fact was on the libellants.

Circuit Court, November Term, 1841. Appeal from the District Court, in Admiralty.

The libel in this case was filed in admiralty, on the 29th of August 1834, stating that between the months of January and August 1834, at the special instance and request of the agent of the owners of the brig Ratler, the libellants furnished and provided various materials necessary and proper for said brig, and for her safety and navigation on the high seas, the times when and amounts whereof were more particularly specified in a schedule annexed to said libel, and

prayed to be taken as a part thereof. That at the times when such materials were furnished, said vessel was a foreign vessel belonging to Oakley & Roome, of the state of New York, and that the libellants had a lien on said vessel for such materials, enforceable by this court. That they had often applied to said owners for the payment of the balance due on said schedule or account, but said owners had always refused to pay the same. The libel prayed for the usual process, and that the vessel might be sold, and the proceeds applied to the payment of the libellants' said debt.

The defendants in their answer denied that the libellants, between the periods mentioned in the libel, provided said materials at the request of the defendants; they admitted that they had been the owners of said brig since the 19th of April 1834; that they believed that not more than thirty dollars of value of the said bill was furnished by the libellants for the use of said brig, and they insisted that the small amount, if any, which was furnished for the use of the said brig, was furnished upon the personal credit, which the master, under whose charge she was fitted out, had with the libellants, and especially with Francis Jones, one of them, with whom the said master, Wm. H. Trott, was upon the most intimate and friendly terms; that the defendants did not know the libellants, and they denied that they, or either of them, or any one for them, requested the libellants to perform any work on the brig, or to furnish any materials for her use, and they denied that, to their knowledge, the libellants performed any work or labor on the said brig, or furnished any materials or other things necessary for her or for her use, unless they furnished some small amount of not more than thirty dollars in value, which the respondents did not admit, but left the libellants to prove the same.

The account filed with the libel was for \$242 70, to which was annexed an affidavit of Francis Jones, one of the libellants, "that the within account is just and true,

as stated, and that he hath not, nor hath his co-partner, or any other person for said firm, received any part or parcel of, or security or satisfaction for the same, to his knowledge."

A deposition of the master, William H. Trott, was filed, in which he stated, that he had a running account with said libellants for such materials and supplies as, from time to time, he required in the course of his business; such materials and supplies being furnished exclusively by them, upon his personal credit. That none of the stores on said bill were for the brig Ratler, except the last item for \$13 36; that he did not do anything with her, until six weeks before she was libelled by the libellants; that his whole account with the libellants for supplies and materials, for several vessels that the deponent had had under his charge, was between two and three thousand dollars; and that the brig Ratler was the property of Oakley & Roome, of New York, from some date in April 1834; that the outfit she required was entirely furnished by them; he further said, that the anchor mentioned in said account was paid for by him in exchange, by giving another; what he did on the Ratler, he did as agent of Oakley & Roome, by virtue of a power of attorney.

This deposition was taken by consent, to be used as evidence on the part of the claimants of the brig, so far as the same contained legal evidence; the other facts proved will appear from the opinion of the court. The decree in the district court was in favor of the libellants, and on appeal taken, the case was argued in the circuit court, and the opinion of the court delivered by—

TANEY, C. J. The libel in this case was filed in the district court for the district of Maryland, against the brig Ratler, to recover the value of necessary materials, furnished by the libellants, for the purpose of fitting her out, at the port of Baltimore; the libel charging that she was



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a foreign vessel, the owners residing in the city of New York.

The claimants admit, in their answer, that they became the owners of the brig on the 19th day of April 1834, and that they reside in New York, and insist, that the materials furnished after they became owners, was a very small amount, if any; and they insist, that they were furnished on the personal credit of the master, under whose charge the brig was fitted out. Various items, necessary for the equipment of the vessel, are charged in the libellants' account, which begins on the 21st of February 1834, and ends on the 15th of July in the same year.

The evidence offered, proves that the vessel was owned by William H. Trott, of the city of Baltimore, until the time mentioned in the answer of the claimants, and the materials furnished during that period are, consequently, no lien upon the brig.

But the claimants, having admitted in their answer, that they became the owners of the brig on the 19th of April 1834, and were residents of the city of New York, and that the materials were furnished at the request of the master, under whose charge the vessel was fitted out, the materials furnished during that period are, undoubtedly, a lien upon her, unless the claimants can substantiate their allegation, that they were furnished on the credit of the master; the burden of proof, as to this fact, is on them. The only witness who testified to this fact, is the master himself; but every witness examined, proves him to be unworthy of credit on oath; this testimony, therefore, must be disregarded. The conversations with one of the libellants, as given in evidence by another witness for the claimants, show no intention to waive any lien the libellants had on the brig.

The books of the libellants have been called for, and used and made evidence by the claimants, and they show that necessary materials of the value of eighty-one dollars and

*Jones v. The Ratler.*

thirty-six cents, were furnished after the claimants became owners; and allowing them a credit of ten dollars for an old anchor, as proved by the testimony, a balance of seventy-one dollars and thirty-six cents was due for these materials on the 15th of July 1834, which is a lien upon the vessel; and the court proceed to decree accordingly. The brig, it appears, was delivered, upon stipulation, to the claimants by the district court.

Decree for \$71 36, each party paying their own costs.

*D. Stewart*, for appellants.

*R. Johnson*, for appellees.

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HENRY LEEF

*vs.*

CALEB GOODWIN, ANDREW FLANNIGAN and SAMUEL  
TRIMBLE.

Where work was done upon a vessel owned by two persons, but registered in the name of one only, and the libellants, who did the work, had no knowledge, at the time, of the interest of the other owner; *held*, that the owner, whose name did not appear in the register, was liable, as well as the other.

According to the principles upon which payments are appropriated, the debtor, if he pleases, has a right to make the appropriation; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice.

In cases of running accounts between the parties, unless there are some particular circumstances to vary the rule, the payments ought to be applied to extinguish the debts according to priority of time.

Circuit Court, November Term, 1841. Appeal from the District Court, in Admiralty.

The appellees in this case filed their libel in the district court against the appellant and Luke League, as joint

*Leef v. Goodwin.*

owners of the schooner *Light*, to recover for work and materials furnished said vessel.

The appellant resisted the claim on the ground that the work and materials were contracted for by Luke League, the other owner; and on the further ground that the whole amount claimed had been paid. Luke League, the other defendant, admitted the allegations of the libel to be true.

The district court (HEATH, J.) rendered a decree for the libellants for the sum of \$275 88, with interest from the 1st of June 1840, and costs; from which decree the appellant appealed to this court.

The appeal being tried at November Term 1841, the following opinion was delivered, on the 2d of December 1841, by—

TANEY, C. J. In this case, it appears from the accounts, that the libellants are ship-carpenters, carrying on business at the city of Baltimore, and that there was a running account, for several years, between them and Luke League, who was one of the respondents in the district court, and who has not appealed from the decree of that court.

The account consists of charges for work done for different vessels, and materials found by the libellants, at the request of Luke League, and of sundry credits given, from time to time, some of which are appropriated to the work done upon particular vessels, and some of them without any specific appropriation. There are a few items in the account not charged for work upon any particular vessel; but generally the vessel is named. The claim made by the libellants in this case is for repairs and alterations of the schooner *Light*; and this claim is a part of the charges against Luke League, in the running account above mentioned. The principal items in relation to this controversy are charged in June and July 1839, at which time, the schooner underwent considerable alterations, so as to convert her from a vessel suited to the navigation of the Chesapeake Bay, to one fitted for the sea. There are two incon-

siderable charges in the March preceding, and one in the October following, but the principal part of the claim appears to have arisen in June and July 1839.

At the time the work was done upon the schooner, the appellant and Luke League, the two respondents in the district court, were joint owners of the vessel, but she was registered in the name of League only, and the libellants had no knowledge of the interest of the appellant. Acting under the impression that League was the sole owner, the charges were made against him, as before mentioned; he has since become insolvent, and the libellants insist that a balance is still due to them for the work done upon the Light, which they are entitled to recover from the appellant.

Undoubtedly, the appellant as well as League, is answerable for this claim, if it has not already been discharged. But the appellant contends that it has been discharged; and as there is no controversy about the original amount of the debt, the whole dispute turns upon the application of the payments which were, from time to time, made by League; and whatever credits would have been applicable to this particular claim, in case League had been the sole owner of the schooner, must enure also to the benefit of the joint owners. His admissions, in his answer in the district court, do not bind the appellant.

The general principles upon which payments are to be appropriated, are clearly stated by the supreme court in the case of the *United States v. Kirkpatrick*, 9 Wheat. 737. The debtor, if he pleases, has a right to make the appropriation; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. And in cases of running accounts between the parties, unless there are some particular circumstances to vary the rule, the payments ought to be applied to extinguish the debts according to the priority of time.

In applying this principle to the case before the court, it

appears from the books offered in evidence, that the account continued between the libellants and League, until July 1841, being about two years after the work was done to the Light; sundry charges, during this period, are made against League, and credits given him to a considerable amount. One of these credits is specifically appropriated to the account; the others appear to be general credits; but it is difficult, from the short entries in the books, to determine whether some of the credits may not have been intended by the entries to be specifically appropriated, and they may, perhaps, be more satisfactorily explained by further proof.

The auditor of this court is, therefore, directed to state from the books of the libellants, the account between the parties to the present controversy, applying the credits, according to the principles hereinbefore laid down. It is unnecessary to go further back with the account than January 13th, 1839, when a balance appears to have been struck, and League found to be indebted in only the small sum of \$10 44. The auditor is also directed to take such further evidence as may be adduced by either party, in explanation of the credits in the account, or any of them; and to state such account as either of the parties may deem conformable to the rules herein prescribed for the application of the payments; and to report his proceedings under this order, to the court, as soon as conveniently may be done.

On the 31st of December 1841, the auditor filed the following report:

The auditor humbly reports to the court, that in obedience to the order of the 2d day of December 1841, passed in this cause, he has examined such witnesses as were produced by the parties, together with the documentary testimony laid before him; and therefrom stated two accounts, No. 1 and No. 2, which are hereto annexed.

The documentary testimony, in addition to the books of

the appellees, consisted of a receipt of Luke League filed by the appellant and herewith returned; and the oral evidence was furnished by two witnesses produced and sworn on the part of the appellees. To one of these, Luke League, the proctor for the appellant objected, as incompetent, and his examination was taken subject to exception.

Hooper was examined in chief, to prove that the item of credit in the books under date of July 8th, 1840, was fifty dollars too large; it appeared by him, that League had done work on a vessel to the amount of \$800 and upwards, and had a claim, accordingly, one-half of which was assigned to the appellees; he afterwards, however, agreed to deduct \$100 from the bill, and the appellees, in consequence, submitted to the deduction; received \$50 less than the amount of the credit. Upon cross-examination, the witness stated, that the agreement to make the deduction, was concluded about three months after the work was done, that is, late in the spring.

Luke League swore that the appellant and himself owned jointly the Leander, Neptune and Light, and that they, together with one Mason, owned the O'Kelly, which is mentioned in one of the bills, by the name of the new schooner; that he paid the whole of the Neptune and Leander's bills, and all that was paid on the Light's bills; that his account against the appellees, was nearly as much as their account against him, which is filed among the papers, dated 1st January 1839; that the balance claimed by the libel and how it was ascertained, was shown to and approved by him before he filed his answer in the district court; that he agreed to deduct \$100 from the bill against the B. Sumner, half of which was assigned to the appellees, and did so, some time after the bill was rendered.

Upon cross-examination, he stated that the bill of the appellees against him, filed with the papers, was rendered by them to him; that he and Leef had a settlement and compromised, he agreeing to take \$250, and Leef's assumption of parts of some bills in lieu of 600 or 700

Leef v. Goodwin.

dollars to which he thought himself entitled; that Leef's assumption was of the one-half of two bills against the Light for sails and copper, and amounted to \$255 36; that the only bills against the Light, at that time, were these two, and that of the appellees; that deponent assumed to pay the other half of the copper and sails bill, and the whole of the bill of the libellants; that prior to the compromise, Leef had paid some bills, and deponent others, and that the receipt shown him was the one which was given by him to Leef at the time of the compromise.

Upon the evidence thus furnished him, the auditor has stated two accounts, Nos. 1 and 2. By the first, the debits on the appellee's books are extinguished by the credits there, according to the priority of the charges; and by the second, it is shown, what items of charge against the Light remain unsatisfied, after such an appropriation of credits. The amount chargeable to the Light, is thus ascertained to be the sum of \$107 01.

No evidence was offered to show that any of the several credits were applicable to particular items of charge, and they have been treated accordingly as general payments.

The testimony above detailed in reference to the reduction of one credit, by the sum of \$50, seemed to the auditor satisfactory, and he has therefore allowed it.

J. MASON CAMPBELL, Auditor.

Auditor's fees \$14.

31st of December 1841.

No. 1.

*Luke League in account with Caleb Goodwin & Co.*

1839.		DR.	
Jan.	13.	To balance . . . . .	\$10 44
		Schooner Sarah Ann . . . . .	5 17
Feb.	4.	" Neptune . . . . .	67 50
"	20.	" " . . . . .	58 81
"	25.	" " . . . . .	8 22
30			

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Mar.	7.	Schooner Light	.	.	.	.	\$2 82
		" Hetta Jackson	.	.	.	.	1 23
"	13.	Caulking boat	.	.	.	.	1 38
"	21.	Schooner Neptune	.	.	.	.	50
"	23.	" Sarah Ann	.	.	.	.	31 39
"	26.	" Light	.	.	.	.	18 53
April	11.	Sundries D. & L.	.	.	.	.	2 50
							<hr/>
							208 49
		Deduct credit	.	.	.	.	20 00
							<hr/>
April	20.	To balance	.	.	.	.	188 49
"	27.	New schooner	.	.	.	.	81 40
		Hetta Jackson	.	.	.	.	5 60
"	24.	"	.	.	.	.	28 01
"	26.	Sundries	.	.	.	.	1 60
May	6.	New schooner	.	.	.	.	49 66
"	23.	Schooner Sarah Ann	.	.	.	.	2 20
"	28.	Dreger & League, sundries	.	.	.	.	3 00
June	14.	Schooner New Light	.	.	.	.	345 59
July	6.	"	.	.	.	.	159 76
							<hr/>
							865 31
		Deduct credits	.	.	.	.	864 93
							<hr/>
July	6.	To balance	.	.	.	.	38

## No. 2.

1839. DR.

July	6.	To balance unsatisfied of bill					
		charged this day	.	.	.	.	38
"	18.	Charge this day	.	.	.	.	\$100 58
Oct.	16.	Charge this day	.	.	.	.	6 05
							<hr/>
							\$107 01

1839. CR.

July	13.	Old mast	.	.	.	.	\$7 00
"	22.	Sundries	.	.	.	.	5 00



Leef v. Goodwin.

1840.						
May	30.	By bill	.	.	.	\$353 48
July	8.	Sundries, bill	.	.	.	356 60
1841.						
Jan.	28.	Sundries	.	.	.	142 85
						<hr/>
						864 93
						<hr/>

Whereupon the court, on the 7th January 1842, passed the following order :

TANEY, C. J. In this case, the court, after hearing the proofs offered by each party, and after the case had been fully argued by counsel on both sides, passed an order, on the 2d day of December last, referring the books and accounts produced in evidence to the auditor, with instructions as to the principles upon which the credits should be allowed. The auditor filed his report on the 31st of December, and the court gave to each party time to file exceptions to the report, until the meeting of the court on this day. Some new testimony has been taken by the auditor, but none that throws any new light upon the subject referred to him, except that of an over credit of \$50 in the books of the libellants against themselves, which has been corrected by the auditor. No exceptions have been filed to the report by either party. It is, therefore, this 7th day of January 1842, by the circuit court of the United States for the fourth circuit in and for the Maryland district, ordered, adjudged and decreed that the report made by the auditor, be and the same is hereby affirmed; and that the said Henry Leef pay to the libellants the sum of \$107 01, with interest from the 16th day of October 1839, each party to pay their own costs, and each to pay the one half of the auditor's fees. And that so much of the decree of the district court as is inconsistent with this decree, be and the same is hereby reversed.

*Stewart & Baker*, for appellant.

*Wm. H. Gatchell*, for appellees.

JAMES DONOHUE

vs.

LANGLEY B. CULLEY.

L. B. C. having contracted with the United States to build a government vessel, entered into a contract with J. D. for a portion of the work; certain *extra work* was done by J. D., by direction of the government superintendent: *Held*, that in order to charge L. B. C. for this extra work, J. D. must show, not only that the work *was not* embraced in the specifications in his contract with L. B. C., but also that it *was* embraced in the contract of L. B. C. with the government.

Circuit Court, April Term, 1844. Appeal from the District Court, in Admiralty.

This libel was filed by the appellant, James Donohue, against Langley B. Culley, owner of a new brig afterwards called the United States Brig Lawrence, to recover the value of work done on, and materials furnished said brig, in the year 1843. The libel was filed on the 9th of October 1843; the amount claimed was \$1186 01.

The respondent in his answer denied his indebtedness to the libellant, as set forth in the libel; or that he ever contracted with the libellant to do the work and furnish the materials, as described and alleged in the said libel.

On the 21st of December 1843, the district court passed a decree in favor of the libellant for \$450, from which decree he appealed to this court. The amount for which the decree was rendered, with interest and costs, was paid into court by the appellee, to abide the result of the appeal.

TANEY, C. J. The material facts in this case are as follows: on the 23d of March 1843, Langley B. Culley entered into a contract with the secretary of the navy, to build a brig (the Lawrence); the size of the brig, the manner

*Donohue v. Culley.*

in which she was to be built, and the materials to be used, being specified in the agreement. The secretary reserved the right of appointing one or more superintendents, with power to reject any materials or workmanship which he might deem insufficient; Captain Gardner was accordingly appointed by the government, and the vessel built under his superintendence.

Culley, after making his agreement with the secretary, entered into contracts with different workmen to perform different parts of the work. Graham & Spedden contracted for the joiners' work, for the sum of \$1300, and after they had done some part of it, Captain Gardner informed Culley that he was not satisfied with their work, and that some other person must be employed; Graham & Spedden upon receiving this information, made an arrangement with Donohue, the present appellant, by which he agreed to furnish the work, under their contract; they to receive \$450 for what was already done, and he to receive \$850, the residue of the sum originally agreed upon. There is, indeed, some difference between the witnesses on this point, and it has been insisted on the part of the appellant, that he came in, under a contract with Culley, to finish the joiners' work specified, for the sum mentioned, and not as taking the place of Spedden & Graham under the original contract with them. But the language of the receipts given by the appellant is too explicit to leave any doubt on this question; and the court is satisfied, from the whole evidence, that he agreed to take the place of Graham & Spedden, and assumed all their responsibilities under their contract.

When the brig was finished, Donahue claimed a large sum of money over and above the \$850, upon the ground that joiners' work had been required to be done, and materials to be used, which were not called for by the original contract with Graham & Spedden. He presented an account against the government, for certain work which he considered as extra, and this account included sundry items which

*Donohue v. Culley.*

are now charged against the appellee. A part of this account, amounting to \$282, was allowed as extra work, for which the government admitted itself to be liable; another part, \$83, was rejected, upon the ground that the prices charged were too high, and the residue of the account, amounting to \$98 12, was rejected, upon the ground that the work was not extra, and was called for and required to be done by the contract with Culley. The last-mentioned items are included in the present account against Culley; and the appellant claims \$443 40 against him, upon the ground that certain work was done by him on the brig, which was not required by the contract with Graham & Spedden, and for which, therefore, the appellant is entitled to a reasonable compensation over and above the sum stipulated in the agreement.

When the libel in this case was filed in the district court, and also at the time of the trial, the sum of \$450, part of the contract price, was yet due and unpaid by Culley; and this sum, as well as the compensation for extra work, of course, claimed by the libellant in the suit in the district court. That court was of opinion that Donahue was not entitled to recover anything from Culley on account of extra work alleged to have been done upon the brig, and therefore, decreed the payment of the \$450 admitted to be due, with interest and costs, but nothing more.

The appellee thereupon paid into court the sum then decreed against him, and the controversy brought here by the appeal is confined to the claim for extra work and materials. The questions which arise, therefore, are: 1. Whether the appellant is entitled to recover anything from the appellee, on account of extra work or materials: 2. If anything, how much?

According to the testimony of Captain Gardner, all of the joiners' work upon the vessel done by Spedden & Graham, or by Donahue, was, in his judgment, required to be done, by the contract of Culley with the government,

Donohue v. Culley.

and none of it was extra work with reference to this agreement. He does not speak of the contract between Graham & Spedden and Culley, with which he had no concern, and does not state that there was any difference in those contracts in relation to the joiners' work specified in them.

Several witnesses who are workmen, have also been examined by the appellant, who prove that joiners' work to a considerable amount was done upon the vessel, which is not embraced in the contract between Spedden & Graham and Culley, and which ought to be regarded as extra work with reference to this contract; but they do not say that it would not be extra also, with reference to the agreement between the government and Culley.

Now, the work in question was all done by the direction of Captain Gardner; and in order to charge Culley, it ought to be shown, not only that the work *was not* embraced in the specifications in the contract with Spedden & Graham, but also that it *was* embraced in the contract with the government; upon the face of the contracts, however, there is no difference between them in this respect, and no difference is shown by the witnesses examined in the case. Captain Gardner, it is true, states that the work in question was required to be done by the contract with the government; and the other witnesses state that it was not required by the agreement of Graham & Spedden; but neither Captain Gardner, nor any of the witnesses, point out any difference between the two contracts with reference to the joiners' work. It appears to the court, that the captain and the other witnesses differ only in the construction which they put upon contracts, which are in this regard precisely alike; and that, if the work was extra with reference to Graham & Spedden's contract, it was extra also with reference to the contract with the government.

Certainly, if the contract with the government embraced the work, and that with Spedden & Graham did not, Culley would, in that case, be justly responsible; but the con-

*Donohue v. Culley.*

tracts are substantially the same as to the joiners' work. What is now claimed as extra, was done by the direction of Captain Gardner, the agent of the United States. If it was required by the fair construction of these contracts, then Donahue is entitled to no further compensation than the amount stipulated in the written agreement with Graham & Spedden; and if it was not required by these contracts, and was extra work, then the government, and not Culley, is responsible, unless, indeed, he had agreed with Donahue to become liable, of which there is no proof.

The decree of the district court must, therefore, be affirmed with costs, interest not to be charged upon the \$450 after the amount decreed was paid into the district court.

*William H. Watson*, for appellant.

*N. Williams* and *Jos. B. Williams*, for appellee.

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WILLIAM THOMAS, Claimant of the SCHOONER EL  
CABALLERO,

*vs.*

LAMBERT GITTINGS, Assignee of DON JOSE V. ADOT.

T., the owner of a vessel, of which F. was master, directed her to be employed in running between Savannah and Havana, under a letter of instructions; a cargo of rice was procured, and put on board at Savannah, on the credit of S., the agent of the vessel at that place; in fitting her for the voyage, expenses were incurred to the amount of \$219 52, for which a bill was drawn by the master, on the owner, living in Baltimore, and accepted by him; this bill was protested, and demand was made upon the master, at Havana, for its payment; A., the consignee at Havana, gave the master a bill on a house in Boston, to reimburse S. for the rice which was procured on his credit, and two days before, advanced the master \$229 and 4 reals, to take up the protested bill of exchange drawn by him on the owner. While the vessel remained at Havana, supplies were furnished her, and money advanced to the master, by A., her consignee at that place; when the vessel was about to sail again from Havana, bound to Baltimore, a bottomry-bond was executed

Thomas v. Gittings.

by the master, in favor of A., the consignee, for the sums advanced by the latter. In an action on this bond: *Held*, that in relation to the bill of exchange for \$600, the proceeds of the cargo, and the freight also, might lawfully have been applied by the consignee to pay what was due on the rice, provided the master acted, in regard to the cargo, within the scope of the letter of instructions; and the application of the freight to this purpose would not impair the consignee's right to the bond subsequently taken for supplies afterwards furnished.

But, how far the consignee could take a bottomry-bond for sums advanced on the vessel, when he ought to have in his hands freight enough to pay the expenses—*quere?*

That the money was properly advanced to take up the protested bill of exchange, as it was stated in the bill itself, that the money was due for disbursements for the vessel, and chargeable to her account, and the owner, by accepting it, admitted that the disbursements were so made and to be so charged.

The person who furnished the supplies, for which the bill of exchange was given, waived his lien on the vessel, by taking the bill, and suffering the vessel to proceed on her voyage; but when the owner afterwards refused to pay the bill, and sent the creditor to demand payment from the master, in a foreign port, he must be regarded as authorizing the master to raise the money upon the vessel itself, if he had no other means.

If the supplies furnished, and the expenses paid, and money advanced at Havana, were necessary for the vessel, they were a sufficient foundation for the bottomry-bond to the extent of such supplies, expenses and advances, provided they were furnished on the credit of the vessel; they will not be presumed to have been made and furnished upon the personal credit of the owner or master alone, unless the fact is proved by testimony. The necessity for such supplies need not have been so urgent that the vessel must have been lost to the owner without them; it is sufficient, if, as matters then stood, they may, in the exercise of a discreet and honest judgment, have appeared to be reasonable and proper for the interest of the owner.

The specific objects to which the money was applied, that was advanced to the master, must be shown, in order that the court may judge of the necessity, upon the proof offered.

Circuit Court, April Term, 1844. Appeal from the District Court, in Admiralty.

The libel in this case was filed on the 29th of May 1843, by the appellee, as assignee of Don Jose V. Adot, against the schooner El Caballero, on a bottomry-bond. The libellant stated that the schooner El Caballero was lying in

the port of Havana, in the island of Cuba, on the 10th of May 1843, destined upon a voyage from said port to Baltimore; that the master of said vessel (Henry Fitzgerald) being in want of money to provide supplies for, and to meet the disbursements of said schooner, and to enable her to make her contemplated voyage to Baltimore, and having no other means of procuring the same, borrowed of Don Jose V. Adot, eight hundred and ninety-two dollars and one real, upon the bottomry of said schooner, and that the same was advanced and paid accordingly, at the rate of ten per cent. for the adventure and risk, making together the sum of nine hundred and eighty-one dollars and two and one-half reals; and that the said Fitzgerald, on the said 10th of May 1843, executed a bottomry-bond, pledging said vessel for the payment of said sum of money, within three days after her arrival at Baltimore, or before her cargo should be discharged. That the money was advanced by said Adot to said Fitzgerald, for the purpose aforesaid, and was necessary therefor, and that the schooner could not have performed her contemplated voyage, if the same had not been advanced and paid as aforesaid; that the vessel being so supplied, proceeded from Havana to Baltimore, where she arrived on the 23d of May 1843, and completed the discharge of her cargo on the 26th of the same month. That by assignment, duly acknowledged, the bottomry-bond was, on the day of its execution, assigned to Lambert Gittings, the libellant, who thereby became entitled to receive the amount due thereon, of which said Fitzgerald received due notice; that the amount due on said bond had not been paid, although the same had been demanded of said Fitzgerald, and that the libellant was entitled to receive the said sum of nine hundred and eighty-one dollars and two and one-half reals, with interest, at the rate of six per cent. from the time it became due. The libellant filed with his libel, the bottomry-bond and assignment.

The answer of William Thomas, owner and claimant of



*Thomas v. Gittings.*

the vessel, admitted that she was at Havana on the 10th of May 1843; that said Fitzgerald was her master; that she was destined upon a voyage to Baltimore, and that said bottomry-bond was executed by said Fitzgerald. But he denied that said Fitzgerald was then in want of said sum of eight hundred and ninety-two dollars and one real, to provide supplies for, or to meet the disbursements of said schooner, or to enable her to make her contemplated voyage to Baltimore; and he also utterly denied that the said Henry Fitzgerald, as such master, had no other means, than upon the bottom of said schooner, of procuring such sum, if any, as he might have so needed; and he also denied that said Adot did advance to Fitzgerald, as such master, said alleged sum. He admitted that said schooner proceeded on and accomplished her voyage, and he also admitted the assignment of the bond, and that the same had not been paid.

That it was falsely alleged in the libel that the sum there mentioned was advanced by said Adot, and was necessary to enable Fitzgerald to provide supplies for and meet the disbursements of the vessel, and to enable her to make her contemplated voyage; and it was also falsely alleged that she could not have accomplished her voyage without said alleged advance. That a part of said pretended advance was an alleged claim of Fitzgerald against respondent, for alleged disbursements on a former voyage, and was paid to and received by him for his own use, and not otherwise. That Don Jose V. Adot, on the said 10th of May 1843, or prior thereto, had received, to the respondent's use, several large sums of money, that is to say, four hundred and forty-six dollars, received by him on the 18th of March, as the net proceeds of certain tierces and barrels of rice, the property of respondent; also, two hundred and eighty-seven dollars and four cents, received as her freight on her contemplated voyage to Baltimore; and also, twenty-three dollars and four reals, received on the 18th day of March, to respondent's use; which sums had not been accounted for, to respondent, by said Adot. That

*Thomas v. Gittings.*

there was no necessity, at the time, and under the circumstances, when said bottomry-bond was executed, for the said alleged advances by the said Don Jose V. Adot; and that in consideration of the premises said Fitzgerald had no right to execute said bond, and the same was void.

A decree for the libellant was passed by the district court. (HEATH, J.), and an appeal to this court was taken and argued. The testimony adduced is substantially stated in the opinion of the court.

TANEY, C. J. The libel in this case is filed against the schooner *El Caballero*, upon a bottomry-bond, executed by Henry Fitzgerald to Jose V. Adot, at Havana, to secure the payment of \$981, 2½ reals; the said Fitzgerald, being the master of the schooner; and William Thomas, as the present claimant, the owner; the bond is dated May 10th, 1843.

It appears from the evidence, that Thomas, the owner of the vessel, on the 1st of December 1842, at Havana, executed a bottomry-bond to the said Fitzgerald, for the sum of \$609, for money at that time loaned to him, and on the same day, appointed Fitzgerald master, and gave him a power of attorney to sell her for any sum not less than \$6000; and by a letter of instructions of the 10th of the same month, he directed the schooner to be employed in running between Savannah and Havana, if freight could be procured, or to take freight from either of those ports to other places, if the master should find it for the interest of the owner to do so, until a sale could be effected.

Thomas returned to Baltimore, where he resided, and Fitzgerald took command of the vessel and made two voyages to Savannah and back again to Havana. On the last of these voyages, the vessel was laden with rice, which was procured at Savannah, upon the credit of Sorel, who was there the agent of the schooner, and she arrived at Havana early in March 1843. In fitting her for this voy-

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age, expenses were incurred at Savannah to the amount of \$219 52, for which a bill was drawn by the master on Thomas, and accepted by him; but the bill was afterwards protested in Baltimore for non-payment, and notice of the protest reached the master at Havana, shortly after he arrived on the voyage last mentioned, with a demand upon him for the payment of the bill. Jose V. Adot was the consignee of the schooner at Havana, and it appears by the accounts, that on the 11th of March 1843, he gave Fitzgerald a bill on a house in Boston for \$600, and on the 9th of the same month, advanced him \$229 and 4 reals to take up the protested bill, and pay the costs and charges upon it. The net proceeds of the cargo of rice appears to have been \$446 and the freight \$287 and 4 reals; there is some difficulty on the testimony as to these sums and dates, which require further explanation. The bill for \$600 is stated to have been given to reimburse Sorel for the rice which was procured on his credit; but I do not understand who were the owners, nor how it happens that \$600 was remitted in payment of a cargo which netted only \$446. The whole cargo could not have been purchased on account of the vessel, as the letter of instruction authorized the master to take an interest of one-fourth or one-third only; nor is it said that the shipment was a losing one; and it is necessary that the character of this transaction should be more clearly shown, before I can determine what influence it ought to have, if any, on the validity of the bottomry. So too, in regard to the money advanced to pay the protested bill; it is charged in the account on the 9th of March; yet the protest was made in Baltimore, and is dated on the 10th, and consequently, there could have been no notice received at Havana at the time this advance is stated to have been made. Perhaps there is some mistake as to the date given in the account.

The vessel remained at Havana about two months, no freight offering during that time, and the master not being able to sell her for the sum limited. While she was so

lying at that port, supplies were furnished and money advanced to the master by Adot, the consignee, and on the 10th of May 1843, when the schooner was about to sail for Baltimore with a cargo of molasses, the bottomry was given which is now in question.

In relation to the item of the bill of exchange for \$600, undoubtedly, the proceeds of the cargo and the freight also, might lawfully have been applied by the consignee to pay what was due on account of the rice, provided the master acted within the scope of his instructions in regard to this cargo; and the application of the freight to this purpose, would not impair his right to the bond subsequently taken, for supplies afterwards furnished. But if that bill was for a larger amount than the sum justly due on account of this cargo, or if the owner was not liable to the full amount thus paid, then the freight may have been misapplied, and the question will arise how far the consignee can take a bottomry on the vessel, when he ought to have had in his hands freight enough to pay the expenses.

The money advanced to pay the protested bill stands upon different ground. It is stated in the bill itself, that the money was due for disbursements for the schooner, and chargeable to her account, and the owner by accepting it, admits that the disbursements were so made, and to be so charged. Undoubtedly, the party who furnished the supplies, waived his lien on the vessel, by taking the bill and suffering the vessel to sail on her voyage; but when the owner afterwards refused to pay the bill, and the protest and demand for payment, finds the master in a foreign port, without any funds of his own in his hands, out of which the payment may be made, what is he to do? Must he suffer himself to be thrown into prison, and separated from the property intrusted to his care, and leave it to be attached and sold under legal process? I think not. It is the interest of the owner, as well as the master, that the money should rather be raised on the pledge of the vessel. And when the owner thus refuses to pay the debt due from

him, and sends the creditor to demand payment from his master on board of his vessel in a foreign port, he must be regarded as authorizing the master to raise the money upon the vessel itself, if he has no other means; such at least are the dictates of equity and justice, and I am not aware of any principle of admiralty law which requires the court to give a contrary decision. This item might, therefore, have been properly included in the bond.

In relation to the other accounts, embracing that of Cagerga, which was paid by Adot, I am not prepared to express an opinion upon these, without a more careful examination. If the supplies furnished, and the expenses paid, and the money advanced, were necessary for the vessel, they were certainly a sufficient foundation for the bottomry-bond, to the extent of such supplies, expenses and advances, provided they were furnished on the credit of the schooner; and they will not be presumed to have been made and furnished upon the personal credit of the owner or master alone, unless the fact is proved by testimony.

When I speak of the necessity of such supplies, I do not mean to say that they must appear to have been so urgent that the vessel must have been lost to the owner without them; it is sufficient, if, as matters then stood, they may, in the exercise of discreet and honest judgment, have appeared to be reasonable and proper for the interest of the owner. But the specific objects to which the money advanced to the master was applied, must be shown, in order that the court may judge of the necessity, upon the proofs offered.

The papers and accounts are, therefore, referred to J. Mason Campbell, Esquire, one of the commissioners of this court, with directions, after notice to the parties concerned, to take the testimony of Henry Fitzgerald, and such other witnesses as may be produced by either party, and to report to this court, on or before the third day of January next, what items of the supplies, charges, expenses and

advances were necessary, and also to reduce to writing and report the testimony of the witnesses, which may be examined before him. I have pointed out some of the obscurities in the evidence already offered, in order to direct the attention of the commissioner to that portion of the controversy, and he will state the account according to the principles of law hereinbefore mentioned and decided.

On the 4th of January 1844, the commissioner filed the following report and account :

To the Honorable Roger B. Taney, Circuit Judge of the United States in and for the fourth circuit and district of Maryland: The report of the commissioner, appointed by the order of your honor, passed on or about the 20th day of November 1843, in this cause, to take testimony, etc., humbly sheweth :

That at the instance of the libellant, he proceeded, upon notice to the respondent, and in presence of the proctors of both sides, to take the testimony of Henry Fitzgerald, late master of the schooner *El Caballero*, upon oath, and that the said witness testified as follows: That the date of the payment made by Adot to him, to take up the protested bill, was on the 9th or 10th of April 1843, and not on the 9th of the preceding month, as erroneously entered in Adot's account current. That the draft was sent out to Havana, by James J. Fisher, of Baltimore, and lodged by him with the house of Deconnix, Spalding & Co., which firm was, he thinks, the same as Jose V. Adot; that the money was paid to deponent by Adot, under the advice of General Campbell, the United States consul at Havana, and his friends. That no suit was brought or threatened upon the draft, and no arrest made; that it was paid at once, because they were treating for the sale of the vessel at the time, and did not wish to have any claim outstanding against her, and because Sorel would hold deponent liable on the draft.

That as to the draft of six hundred dollars on Boston, it

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was drawn early in March, when the vessel had a credit both for the amount of sales of the rice and the freight, and half-commissions on the sales. It was drawn partly to reimburse Sorel, the consignee of the schooner at Savannah, for the rice bought there by him, and sent by the schooner to Havana. Sorel bought it without funds, on the vessel's account, and on deponent's promise that the proceeds of the rice, as soon as sold, should be transmitted him; there was a profit on the transaction. The net proceeds of the draft, at Savannah, were five hundred and twenty-eight dollars; and of this sum four hundred and ten dollars and fifty cents went to the reimbursement of Sorel for the rice, with interest and postages on the same account, and the balance went to pay deponent on account of wages and advances due him by the vessel. The draft was obtained before he contemplated the bottomry, which was not executed until May; at the time it was procured, she was waiting a sale, not freight. The draft was drawn in Sorél's favor, and sent to him, and was received by deponent from Adot. The account herewith exhibited will show the application of the proceeds of the draft. His owner knew neither Sorel nor Adot, and deponent's going to them was of his own motion. The Deconnix, Spalding & Co., mentioned in the account filed by deponent as part of his examination, was José V. Adot; that firm was in liquidation at the time.

In relation to the advance of two hundred and thirty-six dollars, made in different sums, on the 13th March, 26th April, and 6th and 10th May, Caberga's account: deponent recollects that part of the money received by him, either from Adot or Caberga, was paid to the mate on account of deponent's indebtedness to him, and not as wages; the amount so paid was about fifty dollars, and at the time, the vessel was indebted to deponent, in a much larger amount. The items appearing in deponent's account current with the schooner, which is filed among the papers in the case, and amounting to ninety-four dollars and eighty-seven cents, were purchased with the

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advances received either from Adot or Caberga; these articles were all necessary for the schooner. The supplies appearing in Caberga's account were all for the schooner (with the exception of the two boxes cigars, there marked *self*, and bought for deponent) and were all necessary for the vessel. The schooner was always indebted to deponent while in Havana, and part of the money which he received from Adot and Caberga was drawn by him for his owner's expenses. Adot advanced the sum of two hundred and thirty-six dollars he charges, and Caberga the one hundred and two dollars charged him. The former also advanced the amount of the protested bill.

The provisions, &c., charged in Caberga's account, and those in his own list of charges already mentioned, and amounting to ninety-four dollars and eighty-seven cents, were for the general sustenance of himself and crew; they lived aboard the schooner. He brought home with him about thirty or forty dollars of the money he received. On his return to Baltimore, the day after the schooner arrived, and before her discharge of her cargo, he applied to and received from Mr. Gittings, two hundred and fifty-two dollars and twenty-five cents; the occasion of applying was for pilotage, for which he would otherwise have been sued. The schooner arrived on the 23d of May 1843.

That upon the testimony so taken he has stated an account which shows the amount properly secured by the bottomry, and that, in stating it, he has reduced the Spanish real to American money, at the rate of twelve and a half cents the real.

All which is respectfully submitted,

J. MASON CAMPBELL,

4 January 1844.

Cost of report and audit \$10.



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*Schooner El Caballero in account with José V. Adot.*

DR.

To amount of "disbursements" for the schooner, as set down in the particular account thereof, filed among the papers . . .	\$802 37½	
After deducting cash therein charged as paid to Capt. Fitzgerald \$236 00		
And Caberga's account charged therein . . . . .	226 31½	
	<hr/> 462 31½	
		\$340 06½
Cash paid by Adot to Capt. Fitzgerald, for the schooner, being her share of the \$94 87, re- ferred to in the deposition . . . . .		53 84
Supplies furnished by Caberga, deducting two boxes cigars . . . . .		119 83
Cash paid by Caberga to Capt. Fitzgerald, for the schooner, being his share of the above \$94 87		41 03
Commissions of 2½ per cent. on the above \$554 76		13 86
Bill on Boston, to reimburse Sorel, \$410 50, and the premium necessary to make it cash in Savannah . . . . .		418 71
Money advanced to pay protested draft . . .		229 50
Commission on outward freight . . . . .		12 62½
Ten per cent. on amount of bottomry . . .		47 24
		<hr/> \$1276 69
To José V. Adot, on bottomry-bond \$519 69.		

CR.

By net proceeds of rice . . . . .	446 00	
½ commission on do. . . . .	23 50	
Amount of freight . . . . .	287 50	
Bottomry-bond . . . . .	\$472 45	
Ten per cent., maritime risk . . . . .	47 24	
	<hr/> 519 69	
		\$1276 69

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To which report and account the libellant filed the following exceptions :

The libellant in this case begs leave to except to the report and account filed in this cause by J. M. Campbell, Esq., commissioner. Because the said commissioner has deducted from the account of disbursements filed in the cause by the libellant, the sum of two hundred and thirty-six dollars, charged therein as cash paid to Capt. Fitzgerald, and also the sum of two hundred and twenty-six dollars and thirty-one and a quarter cents, charged therein as Caberga's account.

And also because the said commissioner has refused to allow the said libellant other charges constituting part of his claim, to which he was legally entitled.

J. NELSON,  
Proctor for libellant.

On the 11th of April 1844, the above exceptions having been withdrawn, the court (TANEY, C. J.) passed the following decree :

By the Circuit Court of the United States, for the fourth circuit, in and for the district of Maryland. The within exceptions having been submitted without argument, and on the exceptant's assent, in open court, that the same should be overruled; it is, thereupon, this 11th day of April, in the year of our Lord eighteen hundred and forty-four, adjudged and ordered that the same be and they are hereby overruled, with costs to be taxed by the clerk.

It is also hereby ordered and decreed, that the decree of the district court, dated 7th July 1843, and from which the present appeal was prayed, be and the same is hereby reversed, with costs of the appeal to be taxed by the clerk of this court. And it is also further ordered and decreed, that out of the fund in court, deposited with the clerk of this court, the sum of five hundred and nineteen dollars and sixty-nine cents, without interest, be paid to the libellant or his proctor; and that the residue of said sum be

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paid to the said William Thomas, the appellant, or his proctor, after deducting thereout all the costs and expenses incurred in the proceedings in the district court, prior to the appeal to this court, and which costs and expenses incurred in the said district court are hereby ordered and directed to be paid by the said William Thomas.

*William Schley*, for appellant.

*John Nelson*, for appellee.

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WILLIAM H. HARRISON and BENJAMIN HARRISON

vs.

DAVID STEWART and GEORGE R. VICKERS.

The contract created by the signing of a bill of lading for the carriage of goods from one seaport to another, is a maritime one, and within the jurisdiction of the admiralty.

Where goods are shipped on board a vessel advertised to sail for a particular port, and a bill of lading is signed for their delivery at that port, the ship-owners are bound to carry the goods, *by that ship*, to the port of destination, unless prevented by some event beyond their control.

A refusal to perform the voyage, without any legal justification, renders them liable to damages for their breach of contract.

In such case, if the consignee of the goods be merely the agent of the shippers, the latter are the proper parties to the suit, and entitled to recover the damages sustained.

Where, under the above circumstances, the ship-owners offered to return the goods, and the offer was not accepted, the measure of damages to the shippers is not the full value of the goods: damages to that amount are given to the owner when the property is withheld from him against his consent, or has been lost through the misconduct of the defendant.

The ship-owners were not bound to buy the goods because they had broken their contract; but were bound to make compensation for the damages sustained by its non-performance.

Neither could the opportunity which offered of shipping the goods by another vessel, without any additional cost or risk to the owners of them, be used as a bar, or in mitigation of damages; the shippers were not bound to seek or accept any other mode of conveyance, and it was the duty

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of the ship-owners to transport the goods in the manner specified in the bill of lading.

The damage to the owners of the goods is, the difference in value between the goods at the port of shipment, and the price they would have commanded at the port of destination, if the contract had been performed; profits that the shippers might have made by ulterior speculations, or by shipping them from the port of destination to other places and better markets, are too remote to be taken into consideration in estimating the damages arising from the breach of the contract.

Circuit Court, April Term, 1851. Appeal from the District Court, in Admiralty.

The respondents were owners of the ship *Charles* and residents of the city of Baltimore. In the year 1849, they advertised her to be ready to receive freight for San Francisco, and that she was then loading at the port of Baltimore, and would positively sail about the 20th of February. On the 17th of February, the libellants shipped certain merchandise, to be carried to San Francisco, and received a bill of lading therefor, by which they were made deliverable, at that place, to Joseph W. Finley, or his assigns. Finley was to go out as supercargo, and these goods were consigned to him for sale.

Being unable to get a full cargo, the owners determined to break up the voyage, and on the 7th of March, made arrangements with the owners of the ship *Andalusia*, then in the port of Baltimore, and advertised to sail for San Francisco, by which the freight which had been intended to be sent by the *Charles*, was to be received on board the *Andalusia*, on the same terms as were expressed in the bills of lading given to the shippers by the *Charles*.

The libellants declined to accede to this arrangement, or to receive their goods back again, but insisted that they should be carried by the *Charles*, according to the terms of the bill of lading; or else that the respondents should purchase the goods, at the invoice price, including expenses. The respondents declined to do either, and deposited the goods in their warehouse, subject to the order of the owners, and

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notified them of that fact. This libel was filed by the owners of the goods against the owners of the *Charles*, to recover damages for a breach of contract, in not delivering the goods at the port of San Francisco, claiming the whole value of the goods.

The district court decreed in favor of the libellants, for one hundred dollars damages and costs, from which decree they appealed to this court.

TANEY, C. J. This case involves some questions of much commercial interest, and has been fully argued by counsel; some preliminary points, however, which have been suggested in the argument, are, I think, free from difficulty. For it is very clear that, under the decisions of the supreme court, the contract created by signing the bill of lading was a maritime contract, and within the jurisdiction of the court of admiralty. It is equally clear, that the ship-owners were bound to convey the goods to the port of destination, on the ship *Charles*, unless prevented by some event beyond their control; and having refused to perform the voyage without any legal justification, they are liable to damages for their breach of contract. And as the libellants were the owners of the goods, and the consignee nothing more than their agent, they are the proper parties to this suit, and entitled to recover the damages they have sustained.

The material question upon this appeal is, whether the damages awarded by the district court do not fall short of the amount which, in point of law, they are entitled to recover. In forming an opinion upon this subject, it is necessary, in the first place, to examine upon what grounds damages are to be given, and by what rule they are to be estimated. And it is proper to state, with precision, the principles upon which the judgment of the court is founded, in order that the decision in this case may not be misinterpreted or misunderstood.

It appears that, after the respondents had determined

that the ship Charles should not proceed to San Francisco; they offered to forward the goods by the Andalusia, without any additional cost or risk to the shippers; that this ship was quite equal, in her character and qualities for this voyage, to the ship Charles; and upon the refusal of the libellants to accept this proposition, the respondents offered to return the goods. But this was also refused; and the goods have since remained in the warehouse of the respondents, subject at all times to the order of the owners, if they chose to receive them.

Under such circumstances, there can be no just reason for awarding to the libellants damages to the amount of the value of the goods. Damages to that amount are given as a compensation to the owner when the property is withheld from him against his consent, or has been lost by the misconduct of the defendant; but in this case the shippers have not lost their goods, nor have they been detained from them for a moment against their consent. The legal right to them remains, and has always remained in the libellants; the goods themselves have always been within their reach and subject to their control, since the voyage was abandoned; and as they have not lost the property or possession of the goods, by the conduct of the ship-owners, there would seem to be no justice in compelling the respondents to pay them their value. The ship-owners are not bound to buy them, because they have broken their contract; but are bound to make compensation for the damage sustained by its non-performance.

Neither can the opportunity which offered of shipping the goods by the Andalusia, without any additional cost or risk to the libellants, be used as a bar, or in mitigation of damages. The shippers were not bound to seek or accept any other mode of conveyance; it was the duty of the ship-owners to transport the goods in the manner specified in the bill of lading; and that contract required that they should be carried to the port of destination in the ship Charles; nothing could excuse them from the perform-

ance of that duty but some unforeseen event which they had not the power to control; and if they failed to perform it, it is no excuse to say, that the libellants might have accomplished the same object by another ship, or another contract. The shippers had a right to the faithful execution of the contract they had made, and to rely upon it; and were under no obligation to look further, or accept any other contract as a substitute for it.

Under this contract, the respondents were bound to deliver these goods to the consignee of the libellants, at the port of San Francisco, and the damage which they have sustained, is the difference in the value between the goods in the port of Baltimore, in the hands of the libellants, and the price they would have commanded, if the respondents had fulfilled their agreement. This is the amount of loss which the breach of contract occasioned, and is, therefore, the amount of compensation which ought to be awarded to them. It is upon this principle that the case of *Bell v. Cunningham*, 3 Peters 85, was decided by the supreme court, and the rules there laid down are equally applicable to contracts of this description. The case of *Smith v. Condry*, 1 Howard 28, depended upon different principles; it was a case of collision; the owners of the cargo were owners of the injured vessel, and might have forwarded the cargo by another ship, if they supposed the market would be better by an earlier arrival at the port of destination; if there was any loss, therefore, from the delay, it was occasioned by the acts of the owners of the goods. The owners of the offending vessel had no right to take possession of the cargo and forward it to its destined port; the injury which they had done, was, the amount to which they had damaged it, and diminished its value by the collision, at the time and place where it happened.

The remaining inquiry is, would the goods, if delivered according to the bill of lading, have commanded a higher price than they were worth in Baltimore, when the

voyage was abandoned? In determining this question, we must take into consideration the time when the vessel ought to have sailed, and the ordinary length of the voyage. She was advertised to sail "positively," about the 20th February 1849, and she was bound to sail on or near that day. The language of the advertisement does not confine her to a precise day, and it would depend upon the usage of trade to determine what delay was admissible; but in the absence of evidence as to usage, the language of the advertisement would not justify a delay of more than a few days, for it is upon the faith of this promise, that the merchant must be presumed to have shipped his goods to a market known to be subject to sudden and great fluctuations, and if he sustains a loss by the unreasonable delay of the vessel, he is justly entitled to compensation.

It is, however, not necessary to pursue this inquiry; for if the Charles had sailed on the day mentioned in the advertisement, she could not, upon any reasonable calculation, have arrived at San Francisco until late in June. Captain Hugg describes the state of the market from May 1849, until near the close of the year, during which time he was in California, or on that coast; and Captain Codman describes it, in like manner, from the 18th of August to the end of that year. They are both evidently men of much intelligence and observation, and fully acquainted with the matters of which they speak; and they both describe the market at San Francisco as in a state of great depression during the whole time they were respectively acquainted with it, and testify that the goods proposed to be shipped by the libellants, at the prices mentioned in the invoice, must have resulted, not in a profit, but in a heavy loss.

It is very true, that Mr. Finley thinks otherwise; his testimony has been taken under the act of congress, *ex parte*, since the decree was passed in the district court; and he states that, if the Charles had sailed at the time for which she was advertised, and arrived in the usual period of such a voyage, he could have sold these goods for an hundred



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per cent. profit on the invoice price; but he does not mention any period in the spring of 1849, when the market became suddenly depressed. The testimony of Captain Hugg certainly applies to a period antecedent to that at which the *Charles* could possibly have arrived, and Captain Codman, who arrived there in August, found the market in the same state of depression described by Captain Hugg; and although all of the witnesses agree that the market of San Francisco has been subject to sudden and violent fluctuations, there appears to have been nothing but a continued glut and depression of price, from May 1849 to the close of that year, so far as concerned articles like those contained in the libellants' invoice.

It may be, that Mr. Finley having remained in California ever since he went there in the spring in 1849, may have confounded in his memory prices, which may have prevailed at an earlier period of the spring, with the prices of the period of which we are speaking; at all events, it is incumbent upon the libellants who claim the damages, to prove that they have sustained damage; the court cannot presume the fact. Upon this point there is a direct conflict between the testimony of Mr. Finley and that of Captain Hugg, a witness equally respectable and entitled to equal credit; and the testimony of the latter is also supported by that of Captain Codman—not only by the state in which he found the market, but also by the character of the population he describes, and the unsuitableness of the goods mentioned in the invoice to such a class of persons as, at that time, composed the population of San Francisco. The testimony of Mr. Finley cannot outweigh this proof, that no actual loss was sustained.

In relation to the prices that might have been obtained for those goods, at Coquimbo, or other ports usually touched at in the Pacific, it is sufficient to say, that there is no evidence upon this subject; Mr. Finley as well as the other witnesses, must be understood as speaking of the market of San Francisco. And if his testimony is to be

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understood as referring to other ports, and to be correct as to prices there, it could not alter the judgment of the court. The contract of the respondents was to deliver the goods at San Francisco; there is no engagement to stop or deliver them at other ports. Their value at that port is, therefore, the true test; and profits that the shippers might have made, by ulterior speculations, and by shipping them from San Francisco to other places and better markets, are too remote to be taken into consideration, in estimating the damages arising from a breach of this contract.

The decree of the district court must, therefore, be affirmed, with costs.

*John Glenn and John Nelson*, for libellants.

*Wm. Schley*, for respondents.

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LEWIS F. REPERT, for the use of WILLIAM HAMILTON,

vs.

BENJAMIN ROBINSON.

The case of *Ramsay v. Allegre*, 12 Wheat. 611, commented on and explained.

The question whether a note or other security taken for a maritime contract is a bar to the admiralty jurisdiction or not, depends upon the effect which the note or other security has (by the laws of the place where it is made), upon the original contract. If it discharges and extinguishes it, and stands in its place, it puts an end to the admiralty jurisdiction; and the surrender of the note cannot renew the original debt, nor restore the admiralty jurisdiction over it.

The case of *Glenn v. Smith*, 2 Gill & Johns. 508, is decisive upon the point that, in Maryland, taking a due-bill does not discharge the original contract, nor extinguish the remedy upon it; and therefore, a due-bill or promissory note taken in that state, is no bar to a recovery on the original cause of action, under a libel filed in admiralty, provided the due-bill or promissory note be produced and filed at the trial, and offered to be surrendered to the respondent.

## Reppert v. Robinson.

Where repairs are made upon a small vessel of twenty-seven or twenty-eight tons, engaged exclusively in transporting the products of the farms of the respondent, lying in Maryland, to the city of Baltimore, and a libel is filed against him to recover the value of those repairs, alleging that they were useful and necessary for the vessel, and for her safety and navigation on the high seas, and this allegation is not denied, nor is any testimony taken in reference to it: *Held*, that whether a vessel be one of that class which is fitted for the navigation of the sea or not, is a question of fact, not of law, and if disputed, must be tried by the testimony of witnesses.

If the respondent mean to rely upon the character of the vessel in this respect, he must put it in issue by his answer, otherwise no evidence can be received upon the subject.

The manner in which the vessel is actually employed cannot affect the question of jurisdiction; it depends upon her character; if the repairs fitted her for the navigation of the sea, the contract was maritime; and it does not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode or trade in which he afterwards employed her.

The circuit court, upon appeals from the court of admiralty, has the power to suffer amendments to be made to the pleadings, so as to let in new evidence and new grounds of defence.

But this power ought always to be exercised with caution, and for the purposes of justice, and to bring the merits of the controversy fairly before the court; it would hardly be consistent with these principles, to permit an amendment to be made, where the only effect it could produce would be, the defeat of the present suit, and driving the libellant to another forum to recover a claim, admitted to be due, and the justice of which is not disputed: *Held*, also, that the same objection applied to a defence raised in the circuit court, that the repairs were made by the libellant and another as partners, both of whom were still living, and both of whom had taken the benefit of the insolvent laws, since the work was done, and since the due-bill had matured; that it was purely a technical defence, and if it had been raised in the district court, the libel could have been amended so as to obviate the difficulty: *Held*, also, that if it appeared on the proceedings that when the suit was brought, the due-bill was held by an assignee, and the suit was brought for his benefit, the admiralty-jurisdiction could not be maintained.

The right to sue in admiralty upon claims of this description, is personal, and is maintained upon principles and reasons which do not apply to an assignee.

An assignment, after the suit was instituted, and after the court had taken jurisdiction of the case, would perhaps stand upon different grounds from an assignment made before.

The entry of a suit to the use of another has, in modern practice, been recog-

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nised in the Maryland courts of common law, as evidence of title in the party for whose use it is brought; but it is not, according to the established proceedings in courts of admiralty.

Circuit Court, April Term, 1851. Appeal from the District Court, in Admiralty.

The facts of this case are fully stated in the opinion delivered by—

TANEY, C. J. This is a proceeding *in personam*, to recover the value of certain work and labor done, and materials found for the schooner Hamilton or Hamilton Bell, useful and necessary, as the libel alleges, for her safety and navigation on the high seas. The respondent is the owner of the vessel, and the repairs were made at his request, and amount to the sum of \$155 02; these repairs were made in the port of Baltimore, to which the vessel belonged, and both the libellant and respondent were residing in this district at the time.

The answer admits that the work was done and the materials found, as stated in the libel; but avers that the respondent had adjusted and settled the amount by giving the libellant, before the filing of the bill, a promissory note or due bill, and that the money could not, therefore, be recovered in a court of admiralty. The respondent exhibits with his answer the account rendered by the libellant, charging him as debtor to Lewis F. Reppert & Co., at the foot of which is the following receipt:

“Received the above bill, by due-bill, at ninety days, when paid will be in full.

LEWIS F. REPERT.”

The libellant produced and filed, and offered to deliver up to the respondent, the promissory note or due-bill referred to in the answer. The record does not show by whom, or for what purpose, this due-bill was produced and filed in the district court; regularly this ought to have

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appeared on the record transmitted to this court; but proof has been offered here by the proctor for the libellant, that the note was produced and filed by him in the district court, and then and there offered to be delivered to the respondent, and it still remains on file there for the same purpose; and these facts are not disputed by the respondent. The note is as follows:

\$155 02.

Baltimore, June 27th, 1848.

I acknowledge to be justly due to Messrs. Lewis F. Reppert & Co., the sum of one hundred and fifty-five dollars and two cents, for work and labor, and materials put on my schooner Hamilton Bell, of Baltimore, which I promise to pay in ninety days.

B. ROBINSON.

Upon this libel and answer, and the facts above stated, the district court dismissed the libel, without costs, being of opinion, it would seem, that as a promissory note or due-bill had been given for the amount due for the repairs, the court of admiralty had no jurisdiction. This is the only ground of defence taken in the answer, and the case appears to have turned upon it.

This question of jurisdiction has certainly been a disputed one in the courts of the United States; but I have always regarded it as settled by the case of *Ramsay v. Allegre*, 12 Wheat. 611. It is true, that the decision in that case was in favor of the respondent; but so far as the note was an obstacle to the recovery of the libellant, the court place it upon the ground, that the note was outstanding and not surrendered; and the language used in the opinion of the court necessarily implies, that if the note had been surrendered by the libellant, it would not have been a bar to his recovery in the suit in admiralty. This inference is confirmed by the case of *Andrews v. Wall*, 3 How. 573, and the point is directly decided, in conformity

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with this opinion, in the case of the *Barque Chusan*, 2 Story 460.

Indeed, upon principle, independently of authority, it cannot be otherwise. The note is, undoubtedly, a common law contract, made on land and to be performed on land, and no suit could be maintained upon it in a court of admiralty; and if the note, by the law of the place where it is made, is a payment and satisfaction of the previous claim, there is no contract remaining in force over which an admiralty court can exercise jurisdiction. But the fact that the party has a remedy at common law, is not, of itself, necessarily, a bar to his remedy in admiralty; there are cases in which he may seek his remedy in either jurisdiction; and in this case, his right to sue in a court of common law, upon the original contract, was as perfect and undoubted as his right to sue upon the due-bill.

The title, therefore, of a party to a common law remedy, is no bar to the jurisdiction of the admiralty, and the decision against the libellant, in the case of *Ramsay v. Allegre*, was not upon the ground of a defect of jurisdiction, but upon the ground that the note was outstanding and not surrendered. If he had been allowed to recover in the admiralty court, upon his original claim, the defendant might still have been subjected to another action, by an assignee of the note, in a court of common law, and thus compelled to pay the debt twice.

The question, therefore, whether a note or other security taken for a maritime contract, is a bar to the admiralty jurisdiction or not, depends upon the effect which the note or other security has (by the laws of the place where it is made), upon the original contract. If it discharges and extinguishes it, and stands in its place, undoubtedly, it puts an end to the jurisdiction of the court of admiralty; and the surrender of the note could not renew the original debt, nor restore the admiralty jurisdiction over it. But in the case before the court, it is very clear, that the due-bill did not discharge the original contract, nor ex-

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tinguish the remedy upon it; the case of *Glenn v. Smith*, 2 Gill & Johns. 508, is decisive upon this point. I think, therefore, that the learned judge of the district court erred in his decision, and that the due-bill or promissory note was no bar to the recovery of the libellant, since it was produced and filed at the trial, and offered to be surrendered to the respondent.

Two other objections have been taken in this court, neither of which appears to have been relied on in the district court, and which I proceed to consider. The vessel, it appears, is a small one of twenty-seven or twenty-eight tons, and engaged exclusively in transporting the products of the farms of the respondent, lying in this state, to the city of Baltimore; and it is insisted, that this schooner is not, therefore, one of that class of vessels, the repairs of which fall within the jurisdiction of a court of admiralty. But this ground of defence, even if it would have been sufficient in the district court, cannot, upon the pleadings in this case, now be taken.

The libel charges that the repairs in question were useful and necessary for the vessel, and for her safety and navigation on the high seas, and this allegation is not denied in the answer, and indeed, is impliedly admitted. Now, whether a vessel is one of that class which is fitted for the navigation of the sea or not, is a question of fact, and not of law; if disputed, it must be tried and determined by the testimony of witnesses; and if a respondent means to rely upon the character of the vessel in this respect, he must put it in issue by his answer. But no such allegation has been made by the respondent in this case, and no evidence can, therefore, be received on the subject. As the case is presented by the libel and answer, the *Hamilton* must be regarded as a vessel suited to the navigation of the sea; repairs made upon her, in her home-port, fall within the rule laid down by the supreme court, in the case of *The General Smith*, 4 Wheat. 438; and the party making them is entitled to pro-

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ceed against the owner, *in personam*, in the admiralty court, to recover the amount.

The manner in which the vessel is actually employed cannot affect the question of jurisdiction. It depends upon her character ; if the repairs fitted her for the navigation of the sea, the contract was maritime ; and it did not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode or trade in which he afterwards employed her. Undoubtedly, the circuit court, upon this appeal, has the power to suffer amendments to be made to the pleadings, so as to let in new evidence, and new grounds of defence. But this power ought always to be exercised with caution, and for the purposes of justice, and to bring the merits of the controversy fairly before the court ; and it would hardly be consistent with these principles, to permit an amendment to be made, where the only effect it could produce, would be the defeat of the present suit, and driving the libellant to another forum, to recover a claim which is admitted to be due, and the justice of which is not disputed.

The remaining objection taken here, is, that these repairs were made by Lewis F. Reppert & Co., and not by the libellant alone ; and that the firm of Lewis F. Reppert & Co. was composed of Lewis F. Reppert and Peregrine Spencer ; both of whom are still living, and both of whom have taken the benefit of the insolvent laws of this state, since this work done, and the due-bill became payable. The same answer may be given to this objection that has been given to the preceding one. It is too late ; it is not consistent with the answer ; and does not go to the merits of the case ; it is merely technical ; and if it is founded in fact, and had been made in the district court, the libel could have been amended so as to obviate the difficulty. Neither Spencer, the partner, nor any person claiming under him, has interposed any objection to the individual claim of the libellant.

There appears, indeed, to have been an assignment en-



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dorsed on the due-bill, to William Hamilton, which is dated before these proceedings were instituted; but that endorsement is erased, and the due-bill was produced and offered to be surrendered and delivered up by the libellant; he must, therefore, be regarded as the lawful owner, and if it had been assigned, that it had again been returned to him. But if it appeared upon the proceedings, that when this suit was brought, Hamilton held this due-bill, as assignee, and the proceedings were instituted for his benefit, I do not think the admiralty jurisdiction could have been maintained; the right to sue in admiralty upon claims of this description is personal, and is maintained upon principles and reasons which do not apply to the assignee. The case, it is true, is now entered for the use of Hamilton, and the record has come up to this court with that entry upon it; but how or when he became interested, or what his interest is, does not appear. An assignment after the suit was instituted, and after the court had taken jurisdiction of the case, would perhaps stand upon different grounds from an assignment made before.

But however this may be, there is nothing now before the court to show that Hamilton has any right to the money; and I am not aware of any practice in courts of admiralty, which recognises this entry for the use of another, as any evidence of title in the party for whose use it is entered. In modern practice, it has been recognised in the courts of common law in this state, but it is certainly not according to the established proceedings in courts of admiralty. I, therefore, regard the libellant and respondent as the only parties whose rights are in controversy, or who are entitled to be heard, and shall decree accordingly, according to the principles hereinbefore stated.

Decree for the libellant.

*John Glenn*, for libellant.

*Neilson Roe*, for respondent.

JOHN PICKELL

vs.

## THE STEAMBOAT LOPER.

The port where a vessel is enrolled and licensed is her home-port.

The circumstance that her owner or charterer was a citizen of another state, would not make her a foreign vessel at that port.

Supplies furnished at that port must be considered as furnished at her home-port, and will create no lien on the vessel.

A vessel whose voyages are confined within the limits of the district where she is enrolled and licensed, although she may connect with vessels or vehicles by which the line of communication is extended to the port of another state, cannot be considered as engaged upon foreign voyages.

The furnishing of necessaries to enable her to perform such voyages, is not a maritime contract, and has no connection with commerce upon the high seas, and does not fall within the principles and reasons upon which the maritime law implies a lien.

Circuit Court, April Term, 1851. Appeal from the District Court, in Admiralty.

TANEY, C. J. This is a proceeding *in rem*, to charge the steamboat Loper with the value of a quantity of coal furnished by the libellant for the use of the vessel. The case is imperfectly brought up by the record. It appears from the answer, that the Loper was employed under a charter-party, at the time when the coal was furnished; but the charter-party is not produced, nor is it stated for what voyages she was chartered, nor at what port she was enrolled and licensed. But there is enough in the case, notwithstanding these omissions, to enable the court to decide the question of jurisdiction, which will dispose of the whole case.

It is admitted, that the vessel was employed in voyages between Baltimore and Chesapeake City, which is situated at the entrance of the Chesapeake and Delaware canal, on the Maryland side. She formed part of a line established

## Pickell v. The Loper.

for the conveyance of passengers and freight between Baltimore and Philadelphia, passing through the canal; but the Loper did not traverse the whole line, her trips from Baltimore terminated at Chesapeake City, in the same collection district; she must, therefore, have been enrolled and licensed in the port of Baltimore, where the coal was furnished. It is also admitted, that she was owned by citizens residing out of the state of Maryland; but the residence of the charterer is not stated.

At the hearing in the district court, the libel was dismissed for want of jurisdiction, and I think the decision was clearly right. The voyages in which the Loper was engaged, and for which these necessities were furnished, were not even foreign voyages, but were confined to the same state and to the same collection district; they were confined to the district in which she must have been enrolled and licensed. Her connection with another vessel or vehicle by which the line of communication was extended to the port of another state, could not alter the nature or character of the voyages which the Loper performed. And certainly, necessities supplied to enable a vessel to perform such a voyage, is not a maritime contract, and has no connection with commerce on the high seas, and does not fall within the principles and reasons upon which the maritime law implies a lien. The grounds upon which the power to create these liens by the contract of the master or agent, are briefly and clearly stated in the case of the *St. Jago de Cuba*, 9 Wheat. 416, 417.

But if the Loper had passed through the canal, and run from Baltimore to Philadelphia, this libel *in rem* could not be maintained. The circumstance that the owner or charterer was a citizen of another state would not make her a foreign vessel in the port of Baltimore; the port at which she was enrolled and licensed was her home-port. And as she belonged to Baltimore, and the supplies were furnished here, they were furnished at her home-port, and

*Pickell v. The Loper.*

created no lien upon the vessel. This question was directly decided by the supreme court, in the case of the *General Smith*, 4 Wheat. 438, in which the court said, that in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognised by that law. Certainly, there is no law of Maryland which gives such a lien.

The decree of the district court must, therefore, be affirmed with costs.

*John Glenn*, for libellant.

*Wm. Hamilton, Jr.*, for respondent.

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WILLIAM MCKIM and HASLETT MCKIM

*vs.*

HENRY KELSEY and ANDREW GRAY.

A promissory note given for articles furnished towards the repair of a vessel, will not bar a suit in admiralty, on the original cause of action, where the libellant produces the note in court, and surrenders it.

If the district court has not jurisdiction independently of the consent of the parties, that consent could not confer it.

Circuit Court, April Term, 1851. Appeal from the District Court, in Admiralty.

TANEY, C. J. The libel filed in this case by the appellants, only states that, at the request of the appellees, who were agents and part owners of the schooner *Greek*, they found and provided a quantity of copper for the said vessel, which was useful and necessary to her safety and navigation on the high seas; that the appellees gave their promissory note for the amount (\$616 16), payable

McKim v. Kelsey.

on the 23d of August 1848; and that the note had not been paid; and they pray process *in personam* against the appellees, and a decree for the payment of the money.

The appellees accordingly appeared and answered, admitting the facts stated in the libel, and consenting that a decree should be passed as prayed; and the libellants produced the note mentioned in the libel, and filed it in court and surrendered it. There was no testimony taken in the case; and at the hearing in the district court, upon these pleadings and proceedings, the learned judge dismissed the libel without costs.

It is evident, that this decree was founded upon the opinion that the district court had not jurisdiction; and certainly, if it had not jurisdiction, independently of the consent of the parties, that consent could not confer it. But the circuit court is of opinion that the district court had jurisdiction of the case, as presented in the libel, and admitted in the answer. The reasoning and authorities upon which this opinion rests, have been already stated in the case of *Reppert v. Robinson*, just decided, in which the same questions arose; and it is unnecessary to repeat them here; but upon the grounds there stated, this court is of opinion that the decree of the district court in this case is erroneous, and must be reversed.

Decree reversed with costs.

*J. Mason Campbell*, for libellants.

*Wm. R. Preston*, for respondents.

WILLIAM C. WEBB

*vs.*The property of DAVID ANDERSON'S SON, LAMBERT  
GITTINGS, Claimant.

The vessel, of which the libellant was master, was chartered to take a cargo of flour from City Point, in Virginia, to Rio Janeiro, and taking in a cargo of coffee at Rio, to proceed to Baltimore; the charterer was to pay \$1 25 per barrel on the flour, in full for the hire of the vessel for the round voyage; so much thereof as might be needed for expenses, was to be paid to the master at Rio, and the balance, on the arrival of the vessel at Baltimore. The charterer obtained from L. G. (the claimant) large advances upon the flour, and endorsed the bills of lading (which were "to order") to L. G., who endorsed them to his agent at Rio, with directions to purchase coffee with the proceeds, to be shipped to him at Baltimore: the agents of L. G., at Rio, took possession of the flour, on its arrival, and shipped, by the same vessel, to Baltimore, one hundred and thirty bags of coffee, consigned to L. G.: on the arrival of the vessel at Baltimore, the charterer having meanwhile stopped payment, the coffee consigned to the claimant, was taken possession of, under these proceedings, to meet the owner's claim for the freight due by the charterer: the net proceeds of the sale of the flour at Rio did not cover the whole amount of the claimant's advances on it, and the consignment of coffee was insufficient to make up the deficit:

*Held,*

That if the coffee be regarded as the property of the charterer, and shipped by his agents, and the claim of L. G. nothing more than a lien upon it, it would be liable to the whole amount of the freight due under the charter-party.

As between charterer and ship-owner, it is always implied, unless there be an express contract to the contrary, that the freight must be paid before the delivery of the cargo.

If the interest which the claimant acquired in the flour was a mere lien which attached itself to the proceeds, and to the coffee purchased with the proceeds, then the lien for freight would be prior, and preferred to his.

But the interest of L. G. (the claimant) in the coffee, was something more than a mere lien; it was his property, and the charterer had no right to the possession or control of it, nor to the proceeds, unless a surplus remained, after satisfying the amount to secure which the flour had been transferred to the claimant.

The lien of the ship-owners upon the return cargo, under this charter-party, did not depend upon the funds with which it was purchased.

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The claimant was a mortgagee of the flour, and nothing more; but to the extent of his interest, his rights stand on the same ground as if he had been the purchaser; and to that extent he is to be considered the purchaser and owner of the flour, from the time of the assignment and delivery to him of the bills of lading.

The claimant, however, purchased subject to existing claims, and whatever rights the ship-owners had, at that time, acquired under the charter-party, either to the outward or inward cargo, remained unchanged.

The delivery of the flour to the agents of the claimant at Rio, was a delivery to the claimant, who therefore held it, by reason of such delivery to him, discharged of any lien for freight, and consequently, when the flour was sold, there could be no lien upon the proceeds.

Under these circumstances, the coffee was purchased with the claimant's money, and shipped as his property at the ordinary freight.

If the bill of lading signed by the master was in violation of his duty, or inconsistent with the charter-party, it would not impair the rights of the ship-owners.

But this charter-party does not contain the usual clause by which the owner binds the ship, and the charterer binds the cargo to the performance of all the covenants in the charter-party, and upon general principles of law, the merchandise is bound for its own transportation only, and its liability cannot be extended further, except by stipulations in the charter-party under which the voyage was performed.

Circuit Court, April Term, 1858. In Admiralty.

The libel in this case was filed by the late Judge Glenn, on the 20th of November 1851, while at the bar, but being appointed district judge, during the pendency of the cause, it was, under the act of congress, transferred to the circuit judge (TANEY, C. J.), to be tried before him. The freight in question was earned under the following charter-party:

This charter-party entered into this eighth day of May A.D. 1851, between Beverly Clopton, as agent of British barque Invincible, and Thomas Davies, master, burden two hundred and eighty-nine tons, now lying in the harbor of City Point, of the one part, and David Anderson's Son, of the other part: witnesseth that the said Beverly Clopton, as agent, and Thomas Davies, as master aforesaid, for the consideration hereinafter mentioned, have let on freight,

unto the said David Anderson's Son, the whole tonnage of the said vessel, excepting the cabin and other necessary room for the stowage of her dunnage, tackle, provisions and furniture, for a voyage to be made with the said vessel, in manner hereinafter mentioned; and the said Beverly Clopton, agent, and Thomas Davies do hereby promise, that the said vessel shall be staunch, strong, well-apparelled, and furnished with all things necessary for the intended voyage, and that she shall receive from the said David Anderson's Son a full and complete load of flour, at Port Walthall, where said barque shall come, and when the said loading is so completed, to depart with the first favorable wind and weather, and without delay unnecessary, proceed to the port of Rio Janeiro; the said flour to be delivered at said Port Walthall, alongside of said barque, at the risk and expense of said charterer, and on her arrival at said port of Rio, or as near thereto as vessels of her size can approach, shall, there and then, deliver her said cargo of flour within reach of the vessel's tackle, to the agents or assigns of the said David Anderson's Son; the said vessel to be furnished by the agents or assigns of said David Anderson's Son, with a cargo of coffee, or other articles, or so much thereof as may be necessary for ballast, which is to be delivered alongside of said vessel, which said vessel or barque aforesaid shall then proceed on her voyage to Baltimore, in the state of Maryland, where the cargo is to be discharged; and being there arrived, the said loading to be delivered to the said David Anderson's Son, agents or assigns, and thus to end the intended voyage; excepting always against the dangers of the seas, robbers, pirates, restraint of princes and rulers, and all unavoidable accidents and calamities.

For and in consideration of which, the said David Anderson's Son does promise and agree to and with the said Beverly Clopton, agent, and Thomas Davies, master, that there shall be paid unto the said Thomas Davies, master, or his



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successor in office, freight, at the rate of one dollar and twenty-five cents per barrel, on the outward cargo, with five per cent. primage thereon, which is to be regarded as full compensation of freight out and home for the voyage; the said barque being bound to bring home a full cargo of coffee, or other articles, to Baltimore, free of additional freight; it being understood, however, that the said master shall be paid so much of his freight in Rio, as may be required for his expenses there, without commissions. And the said David Anderson's Son will load the barque here with dispatch; and further promises and agrees to allow thirty working days to load the barque at Rio, including the number of days required and necessary to discharge the same after arrival at that port; and the said David Anderson's Son further promises and agrees, that if the said vessel shall be detained longer than the days allowed, then there shall be paid to the captain of the vessel, or his assigns, demurrage, at the rate of twenty dollars per day, day by day, as the same may become due. And for the due performance of all and singular the foregoing obligations, the parties bind themselves each to the other in the penal sum of one thousand dollars. The vessel, on her return to Baltimore, to be consigned to the friends of the charterer there, and to pay two and a half per cent. commission on three thousand dollars, instead of whole amount of freight.

In witness whereof, the parties interchangeably set their hands and seals, the day and year aforesaid.

BEVERLY CLOPTON,	[SEAL.]
THOMAS DAVIES,	[SEAL.]
DAVID ANDERSON'S SON.	[SEAL.]

Signed, sealed and delivered in presence of

WM. B. DUBNEY (as to all the parties).

The facts of the case are fully stated in the following opinion by—

TANEY, C. J. The libellant is the owner of the British barque *Invincible*, and this controversy arises out of a charter-party, by which the vessel was let to freight to David Anderson's Son, a merchant in Richmond.

The contract on behalf of the vessel was executed by Beverly Clopton, as agent, and Thomas Davies, as master, and stipulated on their part that she should receive from David Anderson's Son, a complete load of flour, at Port Walthall (City Point, on the James river), and proceed to Rio Janeiro, and there deliver the cargo to the agents or assigns of the charterer, the said agents or assigns to furnish a cargo of coffee or other articles, or so much thereof as might be necessary for ballast, with which the vessel was to proceed to Baltimore, where the cargo was to be discharged, and the same being delivered to the charterer's agents or assigns, the intended voyage to be ended. And in consideration of the premises, Anderson's Son agreed to pay the master, or his successor in office, at the rate of one dollar and twenty-five cents per barrel, on the outward cargo, with five per cent. primage, which was to be regarded as full compensation of freight out and home, for the voyage; the said barque being bound to bring home a full cargo of coffee, or other articles, to Baltimore, free of additional freight; it being understood, however, that the master should be paid so much of his freight in Rio, as might be required for the expenses there, without commissions.

The barque sailed accordingly, laden with three thousand four hundred and fifty barrels of flour, and arrived at Rio, where the cargo was delivered; only seven hundred and twenty-seven barrels were shipped by Anderson's Son; the residue of the cargo was shipped on freight by other persons. In order to enable Anderson's Son to make this shipment, they obtained from Lambert Gittings, the present claimant, an advance of two thousand four hundred and ninety dollars, upon the following terms, as stated in a letter to him, dated 22 May 1851:

"I have decided to let it go forward on my account, and submit its sale and management to your address, to be consigned by you to such house as you may think proper, and sold on arrival, as you may direct, or to be held by you, as you may judge most to my interest. I submit the entire management of this small shipment to your own discretion, to manage as if your own. I have filled up the bills of lading at the current rate of freight at which the balance of the cargo is shipped."

At the time this letter was written, only five hundred barrels had been shipped by Anderson's Son, upon which the advance by the present claimant was seventeen hundred dollars; afterwards, two hundred and twenty-seven barrels, in addition, were purchased and shipped upon the same terms, upon which the claimant advanced seven hundred and ninety dollars. The bills of lading, signed by the master, stated the shipment to be made by Anderson's Son, and to be deliverable at Rio, to their order or assigns; and they were endorsed and delivered by Anderson's Son to Lambert Gittings, the claimant, making the flour deliverable to his order.

The ship was consigned by the charterer to Maxwell, Wright & Co.; but the flour shipped, as above mentioned by the charterers, was consigned to Miller, Le Cocq & Co., by the claimant, with directions to dispose of the same promptly, to the best advantage, and pass the proceeds to his credit, subject to his future instructions. And in a subsequent letter, he directed the consignees to invest the proceeds in coffee and ship it to him in Baltimore, by the *Invincible*, if she should return at the fair-going rate of freight, otherwise, by the barque *Delawarean*, or some other good vessel.

The flour in question was accordingly delivered to Miller, Le Cocq & Co., and the *Invincible* being about to sail on her return voyage, before it was sold, they purchased, under the direction of the claimant, as above stated, one

hundred and thirty bags of coffee, charging the amount paid for it as a debit against the proceeds of the seven hundred and twenty-seven barrels of flour consigned to them. The bill of lading, signed by Davies, the master of the *Invincible*, states that it was shipped by Miller, Le Cocq & Co., to be delivered at the port of Baltimore, to Lambert Gittings, or his assigns, he or they paying freight for the said goods, fifty cents per bag, with five per cent. primage.

The adventure proved to be an unfortunate one; the net proceeds of the flour did not pay the amount advanced by Gittings, and before the *Invincible* arrived at the port of Baltimore, Anderson's Son, the charterer, had stopped payment, and there was due for freight, under the charter-party, \$3682 58. Under these circumstances, the master refused to deliver the coffee, upon payment of the freight mentioned in the bill of lading, and filed his libel stating that the coffee was put on board as the return cargo, by the agents of Anderson's Son, at Rio Janeiro, and praying that it might be sold for the payment of the freight due under the charter-party. Upon this libel, Lambert Gittings intervened, claiming the coffee as his property, shipped on his account by his agents, and praying that the same might be delivered to him, upon payment of the freight and primage mentioned in the bill of lading.

It is admitted, that the coffee, at the port of Baltimore, is not of sufficient value to pay the amount advanced by the claimant. There is no imputation of bad faith on either side; both parties have evidently acted fairly and honestly, and the difficulty between them has arisen from the inability of Anderson's Son to comply with the contract they made with the agents of the ship-owners.

The question before the court is, what are the rights of these respective parties now before the court, under this contract? For, although the first bill of lading for the outward cargo is signed by Clopton for the master, and the

second by the master, who joined with Clopton in making the charter-party, and these bills of lading state the freight on the flour to Rio to be fifty cents per barrel, yet it is obvious, that these instruments were not intended to supersede the charter-party, or waive the rights which the ship-owner had under it. In the letter of Anderson's Son, of the 22d of May, before referred to, he informs Gittings, that the filling up the bills of lading with the freight specified was his own act; and it appears to have been done for the purpose of entitling Anderson's Son to receive at Rio, for his own use, the amount therein mentioned. There is no intimation in his letter, that the provisions of the charter-party were waived, by a new contract in relation to this flour, and the freight, it appears, was, in fact, paid to Maxwell, Wright & Co., the agents of the charterer, to whom he had consigned the ship.

If the coffee is regarded as the property of Anderson's Son, and shipped by his agents, and the interest of Gittings nothing more than a lien upon it, it would, undoubtedly, be liable to the whole amount of the freight due under the charter-party. The freight, it is true, is regulated by the quantity of flour carried on the outward voyage, and no additional freight is to be charged on the homeward cargo; but the freight agreed upon was the compensation for the round voyage, and the balance due after the payment provided for at Rio, was due on the delivery of the return cargo at Baltimore. There is, indeed, no express stipulation that the delivery is to be made upon the payment of the whole freight; yet, as between the charterer and ship-owner, this is always implied, unless the terms of the charter-party show the contract to have been otherwise; and that the cargo, by the agreement of the parties, was to be delivered before the freight was paid. If the interest which Gittings acquired in the flour was a mere lien, which attached itself to the proceeds, and to the coffee purchased with the proceeds, then un-

doubtedly, the lien for freight would be the prior and preferred one, and his lien postponed until the whole freight was satisfied.

But I think the right of Gittings to the coffee was not a mere lien; it was something more; it was his property, and Anderson's Son had no right to the possession or control of it; nor to the proceeds, unless a surplus remained, after satisfying the amount to secure which the flour had been transferred to Gittings. The coffee was not purchased or shipped by the agents of the charterer; and was never in their possession, nor under their control. It was purchased for Gittings, by his agents, and shipped to him, and at his risk, under his instructions. It is true, it was purchased out of the proceeds of the 727 barrels of flour; but the lien of the ship-owners upon the return cargo, under this charter-party, did not depend upon the funds with which it was purchased. There is no covenant that the proceeds of the outward cargo should be invested in a homeward one; and if this coffee was the property of the charterer, the lien would be precisely the same, whether it was bought with the proceeds of the flour, or with any other funds. The circumstance that it was purchased with the proceeds of the outward cargo, therefore, does not, of itself, make it liable for the whole freight, and is of no further importance, than as a fact to be considered in connection with the other testimony in the case, in determining whether the claimant's interest in the coffee, before and at the time of the shipment, was a lien only, or a right of property.

A good deal of the argument has turned upon the question, whether, in this transaction, the claimant is to be regarded as a mortgagee, or as a purchaser of the flour. It is very clear, that it was a mortgage and nothing more; but that question is not material to the decision; for to the extent of his interest, his rights stand on the same ground, as if he had been the purchaser. This point was decided by the supreme court, in *Gibson v. Stevens*, 8 How.

399, 400, where, in a case analogous to this, the court said, that the mortgagee, to the extent of his advances, was a purchaser, and that the mortgagor retained nothing but an equitable interest in the surplus, if anything remained after satisfying the claims of the mortgagee. And the same principle was applied by the court to the case of a bill of lading, in *Conard v. Atlantic Insurance Company*, 1 Pet. 441. In that case, the bill of lading was endorsed and delivered, as a security for money lent, in like manner with the case before us; and the court held, that the interest of the mortgagor, or assignor of the bill of lading, was nothing more than a resulting trust in the surplus, if any remained after satisfying the debt intended to be secured. To the extent of his advances, therefore, Gittings is to be considered the purchaser, and as the owner of the flour, from the time of the assignment and delivery of the bills of lading. He, however, purchased subject to subsisting claims; and whatever rights the ship-owners had, at that time, acquired under the charter-party, either as to outward or inward cargo, remained unchanged.

Now, in relation to the 727 barrels of flour, there was no lien, except for the freight to be paid at Rio. There is no allegation that this stipulation of the charter was not complied with, or that this flour was liable to be detained by the ship-owner, or improperly delivered by the master. The consignees of the claimant paid, it seems, all that was demanded or due upon it as freight, and the flour was delivered to them, and received by them, as the property of Gittings, to be disposed of in every respect as he might think proper. The possession of the agents of the claimant was his possession; and he, therefore, held the property in, and the possession of, this flour, on shore at Rio, free and discharged from any lien upon it for freight; and consequently, when the flour was sold, there could be no lien on the proceeds. He was not bound to invest them in a return cargo, and if he did so, he was not bound to ship it by the *Invincible*.

The proceeds were in his hands, and his exclusive property, to the extent of his advances; and he was not restricted in the disposition he might choose to make of them, by any contract with the charterers on his part, nor by any contract or covenant between the charterers and the ship-owners, made previous to the assignment to him. His agents were expressly instructed, if they shipped by the *Invincible*, to ship at the fair going rate of freight, and had no authority to place it on board the barque upon any other terms. Under these circumstances, the coffee was purchased with his money, and shipped as his property, at the ordinary freight. If the bill of lading signed by the master was in violation of his duty, or inconsistent with the charter-party, it would certainly not impair the rights of the ship-owners; but it was his duty to receive on board, from individual shippers, any cargo that might be offered at the ordinary freight; it was no more in violation of the charter-party to receive and transport the goods of Gittings than of any one else. There being no stipulation in the charter-party that the proceeds of the flour should be invested in a return cargo, there can be no more ground for charging his coffee with the whole freight, than the goods of any other individual who shipped a homeward cargo; and it will hardly be said, that the property of every individual shipper, under a charter-party like this, even if he had notice of its terms, would be liable for the whole freight, or any freight beyond that of its transportation.

This charter-party does not contain the usual clause by which the owner binds the ship, and the charterer binds the cargo to the performance of all the covenants in the charter-party. Upon general principles of law, the merchandise is bound for its own transportation only; and its liability cannot be extended further, except by stipulations in the charter-party under which the voyage was performed.

The cases referred to are distinguishable from this, and



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were determined upon principles which do not apply to the case before me. In the case of *Faith v. East India Company*, 4 Barn. & Ald. 636, the goods were purchased in the foreign port, by the agents of the charterers, for and on account of the latter; and although they were shipped, by the bill of lading, in the name of these agents, yet they were marked with the initials of the charterers, and the letter of the shippers to the consignees directed them to account with the charterers. The claimants were these consignees, and they had advanced money to enable the charterers to purchase the outward cargo, but they had no assignment of the bill of lading, and no property in the goods shipped to, and sold at the foreign port; nor was the return cargo purchased for them or with their money, but for and on account of the charterers themselves, and with their means in the hands of their consignees, at the outward port.

Besides, the transaction was obviously collusive, and intended to deprive the ship-owner of his lien for freight on the goods of the charterers. The freight for the round voyage was sixteen pounds per ton of the vessel. The master was one of the charterers in interest, although not named in the instrument, he had a joint interest with the charterers in the adventure, and was appointed master at his request; and he was expressly required by the instructions of the ship-owner, "*to sign all bills of lading with the clause of freight payable according to charter-party.*" The master (Chivise), finding, after his arrival at the foreign port and landing the cargo, that the adventure would prove a losing one, retired from the command of the ship, and concurred with the consignees in appointing a new one; and the new master signed bills of lading for the goods which were purchased, as above mentioned, for the charterers, stating in the bills of lading that the goods were to be transported for the ordinary freight. This was in direct violation of the instructions of the ship-owner; and it was evidently a contrivance to deprive

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the ship-owner of his lien for freight on the return cargo, in order to pay, in preference, a debt due to the consignees of the return cargo, who had advanced money for the outward voyage. The court so regarded the transaction, and it is so treated in their opinions, especially in that of Chief Justice Abbott.

In the case of *Gracie v. Palmer*, 8 Wheat. 605, the contract of affreightment was for a round voyage, from Philadelphia to Madeira, and thence to Bombay and Calcutta, and home to Philadelphia; thirty-three thousand dollars to be paid as freight for the whole voyage at her home-port, before the return cargo was delivered. The charterer sailed in the vessel, and being unable, at Calcutta, to obtain a full cargo on freight, for the return voyage, entered into an agreement with Palmer, that if he would make him an advance, to purchase the merchandise, the goods should remain in Palmer's possession, while they remained in Calcutta; and that he would deliver to him a bill of lading stipulating for the delivery of the goods to the agents of Palmer in Philadelphia, free of freight. This agreement was made with the consent of the master, and the money was advanced, and the goods purchased accordingly by the charterer; they were shipped as the goods of the charterer, and on his account and risk, to be delivered to a certain house in Philadelphia, named in the bill of lading, the freight, as stated in the bill of lading, having been settled at Calcutta.

In this case, therefore, the goods were purchased by the charterer himself, and shipped on his account and risk; and by the terms of the charter-party, the freight was to be paid to the ship-owner in Philadelphia, before the delivery of the return cargo; the master had no authority to alter this contract, nor to receive the freight at a foreign port; and in truth, no freight was paid. The principle upon which the case turned, and upon which it was decided, is briefly and clearly stated in the opinion of the court.

In page 634 of the report, Mr. Justice Johnson, who delivered the opinion of the court, says: "The goods are expressly laden on board as the property of Chambers (the charterer) on his account and risk; and the question is, not how far his contract may exempt the goods of another from freight, but how far he may encumber his own goods with a lien, which shall ride over or supersede their general liability for the freight." And it must be observed, that nothing more was demanded by the ship-owner, than the freight usually demanded on such goods from India; the freight for the whole voyage was not claimed.

The case before me, in every material circumstance, differs from this. Here the goods were not purchased by the charterer, nor for him by his agents; nor were they shipped as his property, nor at his risk; they were charged with the usual freight on such goods from Rio, which the claimant has offered to pay; and there is nothing in the bill of lading signed by the master, at variance with the terms of the charter party.

The case of *Campion v. Colvin*, 3 Bing. New Cases 17, is equally distinguishable from the present. The facts and the points decided in that case are summed up in the opinion of Tindal, Chief Justice, on page 28. "In the first place," says the chief justice, "the outward cargo was consigned to Messrs. Colvin & Co., in Calcutta, the persons who were the agents of Gooch (the charterer), himself; in the next place, the return goods were purchased by advances made by Colvin & Co. to Gooch, upon the security of the outward cargo, which still remained in their hands; in the third place, the case expressly says, these goods were and still are the property of Gooch, and by the bill of lading, were consigned on his part to some person in London. Are we to say upon that, that the particular mode of consigning these goods, which Gooch, the owner, thought proper to adopt, should vary the real situation of the parties?" This summary is sufficient to show how

essentially the case of *Campion v. Colvin* differs from the present in its circumstances, and how different the point decided in that case is from the one now before me.

As relates to the case of *Small v. Moates*, 9 Bing. 574, it would be perfectly analogous to this, if the matter in dispute here was the freight payable at Rio, on the flour, according to the terms of the charter-party. As I have already said, the transfer or sale of the property, after it was shipped by Anderson's Son, could not deprive the ship-owner of any lien upon it, to which he was entitled against Anderson's Son, by virtue of the charter-party. But there is no dispute about the freight payable at Rio, upon the delivery of the outward cargo; the claim goes further, and insists that a lien for the whole freight attached to the outward cargo shipped by Anderson's Son, adhered to the proceeds, after it had been delivered to the purchaser, and followed the merchandise bought by him with the proceeds, and shipped on board the chartered ship, as his property, and on his own account and risk. No case has extended the lien of a ship-owner so far; and for the reasons stated in this opinion, I think it cannot be so extended in the case before me, and shall decree accordingly. If the coffee, at the port of Baltimore, was worth more than the amount for which it was assigned to the claimant, the surplus would be liable to the whole freight due the ship-owners, and the order in favor of Davenport would be no obstacle to the recovery. But as it is admitted that there will be no surplus, it is liable only for its own freight from Rio de Janeiro.

I have looked into the case of the Schooner *Volunteer* and cargo, 1 Sum. 551, which, at first view, seemed to have some analogy to this; for there the proceeds of the outward cargo, then on board, were assigned, and the inward cargo purchased with these proceeds was held liable for the whole freight stipulated in the charter-party. But this assignment, it appears, was not made to a purchaser or mortgagee, but was an assignment for the benefit of creditors; the char-

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terer having become bankrupt during the outward voyage, of course, these assignees stood in his shoes; and the assignees had no greater or superior rights in the return cargo, than the charterer himself would have had, if he had not become insolvent; nor, indeed, were any greater rights claimed for them, as is evident from the opinion of the court.

*J. Glenn*, for libellant.

*J. Nelson* and *A. S. Ridgely*, for claimant.

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JAMES HOOPER and OTHERS

*vs.*

WILLIAM RATHBONE and OTHERS.

Where goods are shipped under a bill of lading, by the terms of which the ship-owners are exempted from responsibility for losses by perils of the sea; and a part of the goods are lost or injured: *Held*, that as a loss by perils of the sea is an exception to the undertaking of the carriers to deliver the cargo safely at the port of delivery, it is incumbent upon them to show that the loss in question was occasioned by such peril; otherwise, they are liable for the whole damage sustained.

The ship was on a voyage from Baltimore to Liverpool with a cargo of wheat and tobacco; on the first day out from the capes of the Chesapeake Bay, and for several days after, she experienced heavy weather, and became leaky, the pumps became obstructed, and finally choked from the wheat getting into them; and as a measure of safety she was compelled to put into the port of St. Thomas; there she was unloaded, in order to repair, and a good deal of the wheat was found to be spoiled, and was thrown away: The storm was not violent enough to dismast her or carry away her sails, but it blew heavily; the sea was rough, and the ship was rolling and pitching in it, and shipped a good deal of water before any inconvenience was experienced from the wheat in the pumps: the ship was proved to have been among the strongest ever built in Baltimore; the bin where the wheat was stowed was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her: *Held*, that under the circum-

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stances, there was nothing to which the disaster could be imputed, but the perils of the sea.

Although a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargoes, and may be disabled from proceeding on her voyage, by encountering winds and waves through which a different cargo might pass without injury; yet, if there was no fault in the ship, in her equipments, in the stowing of the cargo, or in the manner in which she was navigated, and if every precaution was taken which is usual and customary in transporting such a cargo, the owners cannot be charged with the loss.

After unloading the ship at St. Thomas, the wheat had to be reshipped in bags, and owing to the greater space occupied by the wheat in bags, than was occupied by it in bulk, and owing also to the want of proper contrivances, at St. Thomas, for stowing the hogsheads of tobacco, 1169 bags of damaged wheat were necessarily left out; there was no trade between Liverpool and St. Thomas, and no prospect of shipping the surplus wheat, except by chartering a vessel at a losing expense; which expense would only have been increased by storing the wheat at St. Thomas, till the owners could be advised, and instructions received from them: *Held*, that under such circumstances, the most judicious course, and the one most for the advantage of the owners, was for the master to sell the wheat at St. Thomas.

Circuit Court, Special Session, 15th October 1853. Appeal from the District Court, in Admiralty.

The libel in this case was filed on the 4th of December 1852, by the appellees, merchants at Liverpool, and owners and consignees of certain wheat, shipped from Baltimore for that port, in the month of October 1851, on board the ship *A. Cheeseborough*, of which the appellants were owners.

The libellants charged, that the respondents, their officers, servants and agents, so carelessly and improperly carried said wheat, and so carelessly and improperly and negligently conducted and managed the said ship *A. Cheeseborough*, during her said voyage, and so carelessly, improperly and negligently conducted themselves in reference to the said wheat, that by reason of such careless, improper and negligent conduct, only the amount of 7829½ bushels of said wheat were delivered to the libellants at the port of Liverpool, and the large quantity of 2936

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bushels of said wheat, was not delivered to the libellants, but entirely lost to them.

The respondents, in their answer, after replying to the several articles of the libel, stated by way of defensive allegation thereto, that said ship *A. Cheeseborough*, after the said wheat had been shipped thereon, set sail on her intended voyage, on the 30th day of October 1851, being then sound, tight, staunch and in every respect in a seaworthy condition, and suitably and properly apparelled and appointed in all particulars for the intended voyage; but that after prosecuting the voyage for some days, the ship encountered boisterous and stormy weather, and heavy seas, and shipped large quantities of water on deck; and by reason thereof, she labored very much, and rolled very heavily, and apprehensions were entertained on board lest, by the straining to which she had been subjected, some of the seams of the vessel might have been parted, or other injury sustained; these apprehensions were greatly increased when, on trying the pumps, it was found that large quantities of wheat, and but little water came up. As early as the 5th day of November, this state of case existed; during that day, it blew a strong gale, and a heavy sea was running, and a great deal of water was shipped on deck, and the pumps were used every two hours; and as large quantities of wheat were delivered in pumping, it became necessary to draw very often the lower boxes, so as to clear them of wheat. On the following day, it was found that the pumps were so choked by wheat, that it became necessary to draw them every ten minutes, and it was discovered, at the same time, that there was much water in the hold.

On this day, the crew came aft and protested against proceeding further on the voyage; the master, at that time, did not yield to the request, but continued on his course, in hopes and under the expectation of being able to perform the voyage to Liverpool. On the next day, the pumps being still unmanageable, by reason that they choked every few minutes, the crew again

came aft and requested the master to make for the first port, as it was not safe, in their opinion, to proceed further on the voyage; as the master, still hoping and expecting to be able to make the voyage in safety, did not at the time assent to this request of the crew, the mate entered his opinion on the log-book, that it was not safe to prosecute the voyage. It was not, however, until the 8th, that the master concluded to comply with the request of the officers and crew, and to make for the nearest port; and he was induced to comply, because the pumps were still continually, when used, choked with wheat; the vessel, still under close-reefed topsails, labored very hard, and took in a great deal of water on deck; and it was, moreover, discovered that smoke was rising from the wheat in the hull. It was under these inducements, and from a conviction that it would be perilous and reckless to hold his course, that the master changed his course, for the Island of St. Thomas, where he arrived on the 17th of November. During the voyage to St. Thomas, and most of the time, the ship made considerable water, and the pumps remained in the same state, and there was evidence that the wheat was being injured.

That under such circumstances, the making for an intermediate port, was an incumbent duty on the master which he could not properly, and ought not have disregarded, and the making of the port of St. Thomas, was the making of a port of necessity. That as soon as said port of St. Thomas had been made, the master duly made protest, and applied to the commercial agent of the United States, there resident, to cause a survey to be made by competent and proper persons, of said vessel, &c.; that upon the warrant of said commercial agent, a survey was made on the 18th of November 1851, by proper and competent persons, who reported that they found the hatches to have been properly secured, but who further reported that, upon trying the pumps, so much wheat came up, that it was impossible to ascertain what quantity of water the ship was making at



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the time ; and they further reported, that it was unavoidably necessary that the cargo should be discharged, in order to have the timbers cleansed, and the pumps placed again in a working condition, and they accordingly recommended, that the cargo should be landed as quickly as possible, and that afterwards another survey should be made, in order to ascertain the state of the vessel, and to determine what further proceedings were necessary for the benefit of all concerned.

That in accordance with the recommendation contained in said report, the cargo was in part removed, and a further survey was had of the same, under the direction and by the warrant of the commercial agent, by competent, experienced and proper persons ; which said persons, after particularly examining, and surveying that part of the cargo which consisted of wheat in bulk, reported that they found the same in some places musty, and in the wings, wet with sea-water, but without extending far into the bulk of the cargo ; and they recommended that the whole of the wheat should be put into bags, and brought on shore, in order that it might be ascertained how much thereof was in a fit condition to be reshipped, and what proportion thereof was in a perishable state.

That in pursuance of such recommendation, the cargo was in part unladen, when by the like authority, a survey was had of the ship and cargo, for the purpose of ascertaining the manner of the storage and the dunnage of her cargo, and particularly of the wheat in bulk ; and also for the purpose of ascertaining the condition of the said ship, and the mode and extent to which she had sustained damage, and what repairs were necessary to be made, and what should be done with the said wheat ; and thereupon it was found and reported by the surveyors, who had been selected on that behalf ; that the platform, bulkheads and ceiling of the wheat-bin or pen, had been substantially and protectively built, and that the same were sufficiently high from the ceiling of the ship, and also that the same were properly dunnaged underneath ; but the said sur-

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veyors further reported that they further found, by examination, that a large quantity of wheat, was actually filled up between the ceiling of the bin, and the ceiling of the ship, and also between the timbers of the ship; and that the wheat had run out from the well-secured bin, through small openings of the ceiling of the bin and bulkheads, which small openings had been made from the straining of the bulkheads, in consequence of the heavy and sudden motion of the ship, in rough weather and heavy seas encountered by the ship on her aforesaid voyage; and that, as the wheat shifted its position to some extent during such motions, the grains were forced through such small openings. And the said surveyors recommended that the bulkheads should be taken down, the platform and the ceiling of the bin, and lumber boards taken up, and the ship's bottom perfectly cleaned out from wheat; and that the wheat below the ceiling, being entirely impregnated with salt water, and without any value, should be thrown away, to save further expenses thereon.

That the said cargo was accordingly in great part landed (including all the wheat, except what was so thrown away); a further survey was directed by said commercial agent to be made of said cargo, to ascertain its state and condition, and what was the best to be done with the whole or any part of said cargo, for the benefit of all concerned; and thereupon competent, proper and judicious surveyors, in compliance with the direction to survey as aforesad, did carefully examine and survey said wheat, which had been so landed, and being of opinion that the same was sound, the said surveyors recommended it all to be reshipped. That upon a former examination of the wheat on board of said ship, it had been found in some places to be musty; and the surveyors then acting, recommended that the whole of said wheat should be put into bags and brought on shore; which had accordingly been done, so that the wheat, when examined on the wharf, and recommended and approved by said surveyors, was already in bags, and when re-

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shipped, it was accordingly reshipped in bags; and so much of said wheat was accordingly reshipped, as it was practicable, safely and properly to reship; but that it was necessary to leave out eleven hundred and sixty-nine bags in restowing the cargo, for want of room; which wheat thus left out, the said surveyors recommended should be sold at St. Thomas, for the benefit of those concerned, as no vessel could be procured to carry it to its destination, except at an exorbitant rate of freight. And said bags of wheat so left out were afterwards sold in conformity with such recommendation, and the proceeds thereof were paid over or remitted to the libellants.

And the respondents, therefore, as to the quantity of twenty-nine hundred and thirty-six bushels of wheat mentioned in the libel as not delivered, said that part thereof was lost during the voyage to St. Thomas, and at said last-mentioned place, by being delivered by the pumps, as aforesaid, and thereby becoming damaged and lost; but how much is certain was thus lost, the respondents were not able to ascertain or show with any certainty; that other part thereof was damaged by sea-water, and thrown away as worthless, but how much was thus lost, they could not state with certainty, but they were informed and believed that it was a considerable quantity; and that the residue was not carried in said ship because it was impracticable, safely or properly to carry the same on said ship, and it was sold because it was really best for the interest of those concerned.

The following protest of the crew and officers of the ship was filed with the answer:

At sea, November 6, 1851, at noon.

To Captain Binney:

We, the undersigned, officers and crew of the ship Cheeseborough, of Baltimore, do hereby make our complaint, that for two or three days we have observed that wheat came out of the pumps at times, so we have to keep drawing the pumps repeatedly; but to-day it has come

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out in large quantities, so that we have to be continually drawing the boxes to get out little water. At noon, we found that all the pumps choked, and impossible to get the water out of the ship, we, therefore, think it best for the safety of the ship and cargo, to go to the first port to save life. We are all willing to stay by the ship to save cargo and ship to the last, provided that our petition is granted to us; we think it impossible to keep the pumps from choking, as it is growing worse and worse all the time.

Your obedient servants, &c.

*(Signed by the crew and officers.)*

The decree of the district court (GLENN, J.) was in favor of the libellants, from which an appeal was taken, and argued before this court.

TANEY, C. J. The appellants in this case, who were the respondents in the district court, are the owners of the ship Cheeseborough, which sailed from Baltimore for Liverpool, on the 30th of October 1851. The appellees were libellants in the court below. They shipped by the Cheeseborough, on this voyage, a large quantity of wheat in bulk; the wheat, however, did not load the vessel, and part of her cargo consisted of tobacco, flour and other articles, shipped by other persons.

It appears from the testimony, that the ship was detained (it is presumed by contrary winds) in the Chesapeake Bay; for she did not get to sea until the 4th of November. She went to sea with a fine strong breeze; but during that night, the wind increased, the sea became more rough, and the topsails were double-reefed; the next day, she had strong gales and a heavy sea, in the gulf stream, the vessel shipped a great deal of water, and rolled and pitched heavily; and on the afternoon of that day, a good deal of wheat was brought up by the pumps. On the third day out, the pumps choked from the quantity of wheat that got into them, and on the night of that day, the

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officers and crew presented to the captain a written request to put into the first port; stating in their application, that for two or three days they observed wheat drawn up by the pumps; that on the day before, a large quantity was brought up, and on the day they made the request, the pumps had choked; in speaking of days in this application, the seamen, of course, mean sea-time. The master did not, however, yield immediately to this application, but continued on his course, in the hope that he would be able to reach Liverpool in safety. But the pumps became almost useless from the quantity of wheat that escaped from the bin, and finding from an examination, made on the 11th of November, that the wheat was damaged, and some of it entirely spoiled, that the vessel had become loggy, and that the water was increasing in the hold, he determined to steer for the nearest convenient port, and arrived at St. Thomas on the 13th of the month.

Upon the arrival of the vessel at that port, it appeared, upon examination, that she had two feet water in the hold, and the space between the bottom of the bin and the skin or ceiling of the vessel was filled up with wet and damaged wheat, which was spoiled and had become offensive in its odor. It was found necessary, upon survey, to unlade the vessel, in order to cleanse her from the damaged and putrid wheat, and put her in a condition to pursue her voyage to Liverpool. The wheat was landed in bags, the sound and undamaged part of the cargo separated from the rest, the damp and swollen part, which it was supposed could be saved, was placed in bags marked with a cross, and the portion which had become utterly spoiled was thrown in the sea, under the orders of the local authorities. After the vessel had been properly cleansed and refitted, the cargo was reshipped, and the vessel pursued her voyage to Liverpool, where she arrived safely and delivered the cargo in good order. The wheat was reshipped in bags, and owing to the want of proper contrivances at St.

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Thomas, for stowing the hogsheads of tobacco, as compactly as had been done at Baltimore, and owing also to the greater space occupied by wheat in bags, beyond that required for the same quantity in bulk, it was found impossible, upon reloading the vessel, to take on board the whole cargo, and eleven hundred and sixty-nine bags of the wheat marked with a cross were unavoidably excluded; in the language of one of the witnesses, the ship was chock and block full without them. The master, finding himself unable to take those bags, directed them to be sold at St. Thomas, at public action, and took with him the proceeds of this sale to Liverpool, and paid them over to the libellants, under an agreement that the acceptance of this money should not prejudice any lawful claim they might have to a larger compensation for the loss they had sustained. And this suit is brought to recover the value of the wheat thrown away or sold at St. Thomas, upon the ground that the loss was occasioned by the negligence or misconduct of the ship-owners or their agents, or the want of seaworthiness in the ship, and that they are chargeable, therefore, with the amount which this portion of the wheat would have been worth if it had been brought to Liverpool safe and uninjured. The respondents, on the contrary, insist that the loss was occasioned by the perils of the sea, and that they are not liable for it as carriers, under the bill of lading.

The bill of lading is in the usual form; and as a loss by the perils of the sea is an exception to the undertaking of the carriers to deliver the cargo safely at the port of delivery, it is undoubtedly incumbent upon the respondents to show, that the loss in question was occasioned by such peril, otherwise, they are liable for the whole damage sustained by the libellants. The libellants insist that there is no sufficient proof of any storm or peril of the sea, that could have produced this disaster; and it has been argued, that it must have arisen, either from carrying too much sail, and thereby straining the ship, the first day out,

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when she appears, by the log-book, to have been pressed so rapidly through the water, or from some defect in the construction of the bin, or in the arrangement of the pumps.

It is true, that the storm was not violent enough to dismast her or to carry away her sails; but the evidence shows that it blew heavily, that the sea was rough, and that the vessel was rolling and pitching in it, before any inconvenience was experienced from the wheat in the pumps.

There is not the slightest evidence that the ship was strained by carrying too much sail in heavy weather; and the proof is positive and uncontradicted, that the bin was constructed by one of the most experienced ship-joiners in Baltimore, and was examined by him and the master of the vessel, before the wheat was put in, and found to be without fault; and their judgment is confirmed upon the survey made at St. Thomas after the wheat was unladen, and the construction of the bin examined by the surveyors; and the proof is equally positive and uncontradicted, in relation to the sufficiency, and indeed, the excellency of her pumps.

Now, trying this case upon the testimony before the court, the conclusion is inevitable, that the loss was occasioned by the perils of the sea; for the ship is proved to have been among the strongest ever built in Baltimore; and if the bin was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her, there is nothing but the perils of the sea to which the disaster can be imputed. The master and the surveyors at St. Thomas attribute the damage sustained by the cargo to this cause; and this conclusion is further strengthened by the fact, that this ship, strong as she was, had been so strained by the rough weather to which she was exposed, that she leaked considerably more than at the beginning of the voyage, and required a good deal of

caulking in her upper works, to enable her to proceed from St. Thomas to Liverpool.

No doubt a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargo; and she may be disabled from proceeding on her voyage by encountering winds and waves, through which a different cargo might pass without injury to the vessel or cargo. But it is not suggested that vessels of a different description from this, or differently fitted out, or differently laden, are required to transport wheat in bulk. And if there was no fault in the ship, or in her equipments, or in the stowing of the cargo, or in the manner in which she was navigated; and if every precaution was taken which is usual and customary in transporting such a cargo, I see no ground upon which the ship-owners can be charged with the loss. 12 How. 282, 283.

It is true, that in the written application of the crew to the master, to put into the nearest port, which was presented on the night of the third day out, they stated that they had, for two or three days before, observed wheat brought up by the pumps; and this statement would seem to imply that wheat had been leaking from the bin before the vessel was exposed to the rough weather spoken of in the testimony. If this was the case, it must undoubtedly have arisen from the imperfect construction of the bin, and the respondents would be answerable for all the damage sustained by the cargo. But these loose expressions in a paper of this kind, cannot outweigh the positive testimony of the witnesses examined in the case, and who testify to the sufficiency of the bin, and to the occurrence of strong gales and heavy seas, before any inconvenience was experienced from the wheat.

Nor do I see anything in the conduct of the master at St. Thomas, of which the libellants have cause to complain. It was obviously necessary to unlade the ship; and every precaution appears to have been taken to preserve the wheat from further damage. It could not be reshipped in



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the bin, as the whole cargo would inevitably have been lost, if the damp and damaged portion of the wheat had been mixed in bulk with the good. It was, therefore, absolutely necessary that it should be shipped in bags; and it is by no means clear, that the bags left behind could have gone in safety to Liverpool, if shipped with the rest of the cargo; for it appears that the wheat in some of them (how many is not stated) was still swelled and sticking together in cakes, when it arrived at New York. The surveyors, indeed, thought that it could all go safely to Liverpool; but the master thought otherwise; and I am inclined to think he was right.

However this may be, they were unavoidably left out, for the ship would not hold them; in the language of one of the witnesses, she was full, chock and block, without them; and, as they could not be transported in the Cheeseborough, it was evidently the interest of the owners to sell these bags of wheat at St. Thomas. There is no trade between Liverpool and St. Thomas, and there was, therefore, no prospect of shipping them from that port, unless a vessel was chartered for the special purpose; and the proof is, from those whose business required them to charter vessels, that they would not have engaged to charter one to take on board this wheat, in sixty days, at the rate of one dollar and fifty cents per bag, each bag containing only about two bushels. If they had been carried to Liverpool at such a freight as this, and the wheat, when it reached the port, found to be in the damaged condition in which it reached New York, it would probably have been a losing voyage to the owners; if it had been left in store at St. Thomas until the owners could be advised of the condition in which it was, the expense of storage would have been added to that of freight. The most judicious course, therefore, and the one most for the advantage of the owners, was to sell it at St. Thomas. This was done by the master, and the money accounted for and paid over; the sale appears to have been perfectly fair and for a fair price, and the conduct of the

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master, from the time the disaster happened, appears to have been not only honest and upright in intention, but marked also by much prudence and caution. The damaged wheat was placed in suitable places to dry, and when he found that all of it could not be taken to Liverpool, the best of the damaged bags were carefully selected, and stowed on shipboard in the manner best calculated to protect the wheat from future injury. I see nothing in any part of his conduct of which the libellants have a right to complain; his duty to the shippers as well as to the ship-owners, appears to have been faithfully and judiciously performed; and there is nothing in the evidence to show that either party sustained the slightest damage from anything he did or omitted to do at the port of distress.

The decree of the district court, therefore, must be reversed, and the libel dismissed with costs.

*J. V. L. McMahon, Brown and Brune*, for libellants.

*Wm. Schley*, for respondents.

JACOB TOME, EDWARD RHINEHART and WILLIAM HARTLEY

*vs.*

FOUR CRIBS OF LUMBER, ALBERT DAVIS, Claimant.

Where rafts of lumber, anchored in the Susquehanna River at Port Deposit, within the flux and reflux of the tide, are driven from their anchorage by a high wind and tide, but are not broken up, and whilst floating down the stream, are rescued and brought to the shore; *Held*, that this is not a salvage service.

The person so rescuing it acquires no lien on the lumber, and has no right to retain it from the owner; his remedy is an action at law to recover the value of the service rendered.

This is one of the usual accidents of the lumber trade; if the owners choose to expose their property to the risk, they have a right to do so, and no one can acquire a lien upon the lumber by interfering with it without their authority.

Although no one was on the raft, yet, it was no derelict on that account, or abandoned by those who had the care of it; for it is not the usage of the trade to keep any one on board, while the raft is at anchor.

Such service has none of the qualities or character of the services for which the maritime law of all commercial nations allows salvage, when the property is in danger of perishing from the perils of the sea.

When a raft is broken up and scattered, any one may lawfully take measures to save it from further loss, and secure the property for the owner; but it is rather a case of finding, than of salvage service; and whatever just claim the party may have to a reasonable compensation for his service and time, he has no right to retain the property when the owner demands it; and if he does, it may be recovered in an action of replevin, in a court of common law.

Rafts anchored in the stream, although it be a public navigable river, are not the subject-matter of admiralty jurisdiction, in cases where the right of property or possession is alone concerned; they are not vehicles intended for the navigation of the sea or arms of the sea; they are not recognized as instruments of commerce or navigation, by any act of congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port; and any assistance rendered to these rafts, even when in danger of being broken up, and swept down the river, is not a salvage service, in the sense in which that word is used in courts of admiralty.

## Tome v. Four Cribs of Lumber.

The remedy of the owners of the lumber in this case, to regain the possession, from the party claiming salvage, was an action of replevin, and not a libel in the district court.

The lumber having been taken from the respondent's possession by process which the district court had no jurisdiction to issue, a writ of restitution would be awarded, if there was any question between the parties as to the right<sup>a</sup> of property or of possession, which this court considered an open one; but as the respondent claims no property in the lumber, but merely the right to retain the possession until paid for services which were not of a nature to give him that right, it would be unreasonable and unjust to deprive the owner of the possession he has obtained, merely to subject him to the necessity of recovering it again, in a new suit in a court of common law.

Circuit Court, November Term, 1853. Appeal from District Court, in Admiralty.

This case was instituted in the district court on the 18th of June 1852. The libellants (now appellants), were Jacob Tome and Edward Rhinehart, lumber-merchants of Port Deposit, trading under the name of Tome & Rhinehart, agents and consignees of William Hartley, of the state of Pennsylvania, and the said William Hartley. The libel was against four cribs of lumber, and the contents thereof, in Harford county, in the state of Maryland, and against Albert Davis of the same county, in a cause of spoliation and damage, civil and maritime.

The libellants alleged that on the 17th of April 1852, they, the said Tome & Rhinehart, as agents and consignees as aforesaid, were possessed of two rafts of lumber containing twenty cribs or platforms, and in all 100,000 feet of lumber, which was at that time anchored in the Susquehanna river, near Heckertown, in Cecil county, within the district aforesaid, and within the flux and reflux of tide, and the admiralty and maritime jurisdiction of this court. That on that day, the said lumber, so safely anchored, was carried down the river, about five miles, by the wind and current, in a freshet, to the opposite side of said river, near the shore of one Stephen I. Thompson, of Harford county; and on the 20th of May, the libellants Tome & Rhinehart, sent vessels

and hands down the river to the said lumber, with a view to have the same put on board the vessels, to carry them to Baltimore and the District of Columbia, to Smith, Barnett & Co., and others, to whom the libellants had sold the same.

That by their said hands and agents, they had succeeded in putting all of the lumber alongside of the vessels, preparatory to putting it aboard, when the said Albert Davis, with his servants and agents, came from his shore in a boat, armed with a gun, and threatened to shoot and otherwise violently to disturb and injure the libellants' agents and servants, if they resisted, and finally against their will, cut away violently from the said lumber, four cribs or platforms thereof, by severing the ropes which bound them to the other lumber and the said vessels, and carried them to the shore of the said Albert Davis, and he has since had the said lumber drawn and piled on his farm lying in the said county, and fronting on the said river, next above the farm of the said Thompson.

That after the said Albert Davis had taken away the lumber (worth about \$200), he pretended that he was entitled to salvage for saving the two rafts, and demanded therefor \$150, and also endeavored, by the like violence, to prevent the rest of the said lumber from being put on board the said vessels, under the said pretence. That the said claim for salvage, was a mere pretence to cover and excuse the said spoliation and trespass; for the said two rafts having been anchored as aforesaid, were cast loose by the rise of the river, and carried down, by the current and wind, to the shallow water opposite to the shore of the said Thompson, where the anchor again performed its office; and all the said lumber was perfectly safe and free from all kind of danger, except that incident to lumber afloat as it was at Heckertown; and if the libellants had been present, they would have prevented any person from interfering therewith. That all of it was staunch and tight (no rope or fastening having been broken or disturbed), and would have so continued, but that the said Albert Davis (not with a view to

save it, but with a view to draw it to his own shore, and there possess himself of it, in order to extort money for delivering it up) boarded the rafts and cut the fastenings, whereby about fourteen cribs went ashore, and three of them were carried down the river as far as Swan creek, so as to expose the libellants to risk and expense; which said cribs the said Davis made no effort to recover or secure. And the other cribs so cut away from their fastenings, went ashore on the said Thompson's land, and so remained, in a situation more exposed than they were while attached to the anchor as aforesaid.

That it is the usual manner of preserving rafts of lumber in the Susquehanna river, within the flux and reflux of tide, and within the admiralty and maritime jurisdiction of this court, to anchor the same until they are drawn or piled up on land; and the said Thompson's shore is only about five miles below Heckertown; and the said lumber thus secured by the anchor, was just as safe and required no further interference with than at Heckertown; and was actually put at greater risk, and was in no manner saved or secured by anything done by the said Davis.

That the libellants, Tome & Rhinehart, having been for many years engaged in the lumber trade, and having frequently before had lumber carried by wind and freshet to some point below Port Deposit in the said river, had always been in the habit of making liberal allowances to such persons, as gave themselves any trouble about their lumber; although they always preferred that they should not interfere with it, as lumber was always put at more risk by unskilful handling; and with that view the libellant Tome, about the 30th of April (on his return from New York, where he was at the time of the freshet), on hearing that Davis had been upon the lumber, called upon him; but not finding him at home, left word with his sister, informing her that the libellants were the owners of the lumber, as agents as aforesaid, and offering to pay any reasonable sum for such trouble, as the said Davis or his hands might have been put to in

doing what they might have conceived necessary for the benefit of the said lumber. That they never received any demand from the said Davis, but before the 20th day of May aforesaid, they sent a letter to said Thompson, making a similar offer for any person concerned, which letter they believed and charged the said Thompson showed to Davis; and on the said 20th day of May, the libellants sent the vessels and hands for the lumber, in the manner above mentioned, never suspecting for a moment that there would be the least difficulty, as the said Davis well knew that they were the owners of the lumber, and were willing and able to pay whatever was reasonable for his services.

And they averred, that by reason of the said spoliation by the said Davis, and the threats and violence he used in endeavoring to prevent the rest of the lumber from being put on board the vessels, the said vessels and hands, as well as the other servants and agents of the libellants, were delayed at a heavy expense. The libellants were not able to fulfil their contract with the said Smith, Burnett & Co., in Baltimore, and with others in the District of Columbia, and so in both ways had been subjected to a loss, in the shape of damages, of at least \$150.

That the libellant Tome, notwithstanding the bad conduct of the said Davis and his bad faith respecting the said lumber, and notwithstanding the libellants had been injured instead of being benefited by his interference therewith, yet, for the purpose of obtaining the said lumber without the expense of litigation, offered and tendered to him \$25 for his trouble, if he would give up the said four cribs, which he declined to do. That the said Davis never had taken any steps to obtain salvage, and never made any demand therefor, until after he had taken away the four cribs, when he demanded \$150. That the said four cribs of lumber had been drawn and piled on the farm of the said Albert Davis, in Harford county within the district aforesaid, and were now there, though the libellants had been informed and believed, and so charged, that the said

Davis had been using and consuming the same as if it were his own; so that the whole thereof might not be there, but they were advised that for any deficiency he would be responsible to them. That all of the said lumber was worth between nine hundred and one thousand dollars; and if the said Davis had fixed upon any reasonable demand for salvage, the said libellants would either have paid the same, however improperly demanded, or left sufficient of the said lumber to meet the said demand; but that the whole of the proceedings on the part of the said Albert Davis were designed, by taking the law into his own hands, and subjecting the libellants to heavy and unusual and unnecessary expenses, to extort money from them. Whereby and by the said act of spoliation, the libellants said they had been injured, besides the value of the said four cribs of lumber, in the sum of \$150, as aforesaid.

Prayer for restoration of the lumber, and compensation in damages.

Albert Davis, in his answer, stated that he had no knowledge of what lumber the libellants had anchored in the Susquehanna river near Heckertown, on the 17th of April 1852, and left them to their proof thereof. That he did not know, of his own knowledge, whose lumber had broken away in the Susquehanna river, and came down the bay on the 18th of April, but it was true, as alleged by the libellants, that they sent vessels down, about the 20th of May, to carry the same away. That early in the morning of the 18th of April last, when a very heavy easterly storm was raging, he discovered one raft of lumber drifting down the bay, and along and near his shore, which his servants secured and tied to the adjoining shore of Stephen I. Thompson; that said lumber had no anchor attached to it, and when secured by his servants, was in great danger of being scattered by the violence of the storm, and broken up on the shores of Swan creek, into which the storm was sweeping with great force. That about eleven o'clock of the



same day, he saw another raft drifting down the bay; that he boarded the same, and found that it was dragging its anchor; that it was fast breaking up, but he secured the fastenings, so that it only parted in two parts; one part, consisting of five cribs, he secured on his own shore, and the other part, he secured with the anchor, a short distance from shore.

That having thus secured this lumber, he went in two or three days afterwards, to Havre de Grace, and put up public notices in several places in that town, giving notice that he had secured and saved this lumber, and requesting the owners to apply to him for the same. That some two weeks after this notice was set up, he learned that libellants claimed the lumber, and about the 20th of May, a vessel came down to carry it away, but without the knowledge of respondent, and without having tendered him any compensation for his services in saving it. That on being told that the agents of the libellants, had taken the lumber from the shore, and were about to put it on board of their vessel, he immediately went out to them and forbade their doing so, without first proving it to be the lumber of the libellants, and paying respondent his salvage for securing the same. That they refused to pay anything, and persisted in their efforts to carry away said lumber, when the respondent cut loose four cribs, and carried them back to the shore, and told the libellants' agents, that he would return the same upon the payment of a reasonable salvage, which he thought would amount to \$150. That respondent had his gun in the boat with him, but he never threatened to shoot or injure any one; but the master of the vessel had a gun, and threatened frequently to shoot respondent.

That he placed those four cribs of lumber on his shore, where they remained safely, untouched by any one, until taken by the marshal under the process issued in this case; and the balance of said lumber was taken away by the libellants. That the whole lumber secured by him was worth about \$1000, and he deemed himself clearly entitled to \$150

for salvage, and demanded that sum. That the salvage was not claimed as a mere pretence and excuse, but he was justly entitled to the same, as the lumber, when secured by him, was in great danger of being scattered and broken up, and if the wind had shifted to the north or northwest, it would have been carried down the bay and probably lost; and his sole object in boarding the said raft, was to secure the same, and save the lumber for the owners. That the last-mentioned raft had come loose in several of its fastenings, which he secured, and he denied that he cut loose any fastenings, or in any other manner did anything to separate the same.

That it was true, that one of the libellants called in April last, at the respondent's house, and not finding him at home, informed his sister that the libellants were the owners of the lumber, but he had no knowledge of any offer made to his sister by said libellant to pay any reasonable sum to respondent for his services. That he was never shown any letter by said Thompson, containing any offer of the said libellants, and when they came to take away said lumber, no offer was made to pay respondent for his trouble in securing the same; that said Tome subsequently offered him \$25, which he refused, deeming it entirely inadequate to compensate him for his services; that as soon as the agents of the libellants came to claim the lumber, respondent made his claim for salvage to the amount above mentioned. That he caused the said four cribs of lumber to be piled up in a place of safety on the shore; that no part of the same was used by him or his servants or any other person to his knowledge; and that the loss, if any, which might have accrued to the libellants by reason of respondent's refusal to deliver them the four cribs of lumber, might have been avoided by their paying him his reasonable demand for salvage.

The notice referred to in the above answer, was as follows:—

Notice.—On the 18th of April, was taken adrift, a number of platforms of lumber. Apply to

ALBERT DAVIS.

On the 10th of December 1852, the district court (GLENN, J.) passed a decree for the sale of the lumber, directing that the defendant, Davis, should be paid out of the proceeds the sum of \$150 for salvage; each party to pay his own costs. From this decree, the libellants took an appeal.

In addition to the evidence offered in the court below, the depositions of several witnesses were read at the hearing of the appeal, the substance of which, is fully detailed in the opinion of the court.

TANEY, C. J. This dispute has arisen from a claim of salvage made by the appellee, for saving, as he alleges, two rafts of timber belonging to the appellant, Hartley, and consigned to Tome & Rhinehart, his agents, at Port Deposit.

These rafts had been floated down the Susquehanna river, and anchored in the stream below Port Deposit; while they remained thus at anchor, a sudden rise in the river took place, accompanied by a high wind and heavy sea, which floated the rafts from the place where they were anchored, and carried them with the current down the river. The respondent, Davis, owns a farm bordering on the river, about five miles below the place from which the rafts had floated off. As they descended the river, they passed near his shore; and the first that came down was taken possession of by his servants, by his direction, and fastened by a chain to a tree; it was, however, fastened to the shore of Stephen I. Thompson, who owns the farm immediately below that of Davis; the current having swept the raft a little below Davis's line, before its motion was arrested. When the second raft came down, which was a few hours afterwards, Davis boarded it, at some personal risk; and while he was on it, five cribs broke off, which he drew to his own shore and fastened there; the residue of the raft was held by the anchor attached to it, after being drawn by Davis into shallow water. There is some difference in the testimony as to the cause of the separation of these five cribs from the residue of the raft, while Davis was on board. But

it is not necessary to examine this question; for in the view which the court take of this controversy, it is immaterial whether, as he alleges, the raft was about to break up when he reached it; or, as the appellants insist, the cribs were separated by him.

Three of the five cribs anchored off his shore, broke loose from the other two, and floated down to Swan creek, where they were afterwards found safe, and recovered by the owners, when they came with their vessels to take away the lumber; the residue remained at the place above mentioned, until the owners came for it. Davis put up an advertisement at Havre de Grace, immediately after he had taken up the lumber, stating that he had done so, and requesting application for it to be made to him; and he was shortly afterwards informed by an agent of the libellants that it belonged to them. It remained for some weeks. It was planked, or what is usually called boards; and was destined, part for Baltimore, and part for the District of Columbia. It was suffered to remain so long, because it is more convenient to load it on vessels in high water, when it can be floated off from the shore without breaking up the cribs.

As soon as the state of the water became favorable, the libellants sent their agents with two vessels to take the lumber, and carry it to the places where they had engaged to deliver it. They took the raft from Thompson's shore without any opposition from him, or any demand for compensation; they also took the five cribs which had been fastened by Davis to his own shore, and attached them to the rest of the lumber, and were engaged in lading the vessels, when Davis came on the raft, and insisted that the plank should not be taken away until he was paid salvage for his services; he was offered twenty-five dollars, which he refused, and demanded one hundred and fifty. And upon this disagreement, a scene of violence, by no means creditable to either party, ensued, in the midst of which, Davis succeeded in detaching four cribs from the raft, by cutting the fastenings; he took them to his shore, and

## Tome v. Four Cribs of Lumber.

drew the plank from the water, and piled it on his land; claiming the right to retain it until he was paid the sum he demanded for salvage.

The owner, and the agents to whom he had consigned it, thereupon filed this libel in the district court, praying that this lumber might be delivered to them, and Davis compelled to pay damages for its detention. Process was accordingly issued, and the plank delivered to them by the marshal; and a monition in the usual form served upon Davis, who appeared and put in his answer; he insists on his claim of one hundred and fifty dollars for salvage, and his right to retain the property until it is paid.

The district court was of opinion that he had rendered service to the libellants, in saving these rafts, of the value claimed by him; that they were salvage services which gave him a lien on the property; and directed these four cribs to be sold, and the sum above-mentioned to be paid to the respondent out of the proceeds. From this decree the libellants have appealed to this court.

The sum in dispute is a small one; but this question is important, from the great quantity and value of the lumber annually brought down the Susquehanna river, and anchored in the stream at or near the place from which these rafts floated. One of the witnesses states that in the month of May 1852, he saw from one hundred to one thousand anchored there; all of them being more or less liable to be swept down the river by a sudden rise in the waters.

The course of the trade is this: In order to send it down the river, it is in the first place put up in cribs, varying, in some degree, in size, but most commonly about sixteen feet square; they are strongly secured so as to keep the lumber together; a number of these cribs (generally about ten) are then strongly fastened to each other, and form what is called a raft. In this state it is floated down to Port Deposit, and remains there until it is sold, or the owner prepared to transport it to another market; when it is to be transported to any of the great lumber markets, either by the purchaser or

original owners, it is either laden in vessels from the rafts, which are brought alongside for that purpose, or formed into what is called a float, and floated to its place of destination.

A float, in the language of the trade, means two or more rafts attached together, and prepared, by proper fastenings and suitable arrangements, to withstand the winds and waves of wider waters; but the lumber is not often transported in this condition, except to Baltimore. The rafts which first come down in a rafting season are usually fastened near the shore, at Port Deposit; when that space is filled up, those that follow are anchored in the stream, and often remain anchored there for some weeks, before the lumber is transported to another market.

As I have already said, while they remain in this condition, they are always liable to be swept from their anchorage by a sudden rise in the river; but the owners are, of course, well aware of this danger, and willing to encounter it; because the winds and currents almost invariably drive them into shallow water, where the current is not so strong, and where the anchor attached to the raft will again take hold and keep it anchored until the owner desires to remove it. All of the witnesses engaged in this trade say that they regard the risk of losing their lumber by this means as a small one; for the raft very rarely breaks up, or floats into the Chesapeake Bay; and that they are very unwilling that any one, without their authority, should interfere with it, as it drifts down the river, or haul it to the shore. They prefer to take the chances that the anchor will again take hold, because the raft is apt to be broken by thumping on the shore, when fastened in water too shallow, and in a place exposed to the waves; and that the lumber is in some degree injured, if improperly handled when piling it on to land, and more expensive and troublesome to put on board of vessels, than it would be if anchored out in the river. When the raft is missed from the anchorage at which they placed it, their own agents are sent to look after it and see

that it is secured in a place of safety; but where they find that any one has rendered them a service in this respect, before their agents arrive, they are accustomed to pay them a reasonable compensation for their trouble.

Now, the first question before the court in this case, is, not whether Davis rendered a service or not, or what is the value of his service, but whether that service was a salvage service or not. For, if it was not a salvage service, then he has no lien on the lumber, and had no right to detain it from the owner; his remedy would be an action at law to recover the value of the service he rendered.

And I think this is not a case for salvage. The water in the river had risen, and a heavy wind was blowing, and these rafts were driven from their anchorage; but they had not broken up, when he boarded them, and were floating down the stream. It was one of the usual accidents of the trade; and if the owners choose to expose their property to this risk, they have a right to do so, and no one can acquire a lien upon it by interfering with it without their authority. It is true, no one was on the raft; but it was no derelict on that account, or abandoned by those who had the care of it; for it is not the usage of the trade to keep any one on board while the raft is at anchor.

The case of the *Udnor*, 2 Hagg. 3, was a stronger case than this in favor of salvage. The *Udnor* was a flat-bottomed barge, loaded with manure, which was found on a sand-bank, with the water over the upper dead-eyes of the shrouds, the sails (except the mizen) washing about, no person on board, and no anchor out; she was boarded in that condition, with much difficulty, by some men who took her to Sheerness, and claimed salvage for their services. It was proved, that it was a common case for vessels to be left on that sand, until the owners could procure assistance, and that the master and a lad who navigated her had made all safe, and then went to the owner to have assistance sent to her. Lord Stowell refused salvage, saying that individuals who thus choose to expose their property to the chances of wind and

weather, have a perfect right to exercise their own discretion upon the matter, and that other persons are not entitled to interfere.

The case of *Nicholson v. Chapman*, 2 H. Black. 254, is still more analogous to the case before the court. In that case, a quantity of timber was placed in a dock, on the banks of the Thames, but the ropes by which it was fastened got loose and it floated off, and was carried by the tide to some considerable distance, and left at low water upon a towing-path; it was removed to a place of safety, at some distance, and the party who took care of it claimed salvage for his services, and a lien for them on the timber. But the court held, that taking care of timber in that situation, although on a navigable river, and within the flux and reflux of the tide, did not entitle the party to salvage, nor give him a lien upon the property for his services; that the service had none of the qualities or character of the services for which the maritime law of all commercial nations allowed salvage, when the property was in danger of perishing from the perils of the sea. The case under consideration comes within the distinction taken in the case referred to. The rafts are prepared to float the timber down the current of the narrow part of the river; but they are not prepared or intended to encounter sea perils; the lumber is placed in vessels, or in floats, before it is exposed to the winds and waves of the Chesapeake Bay; and in that condition it is usually transported to the places for which it is destined. If the raft is carried off from its anchorage by the rising of the river and high winds, the owner knows what direction it will most probably take, and where to look for it; and even if the rafts and cribs are all broken up and cast, in separate pieces, on the shore, the quality of the lumber is not much injured, and if never found by the owner, his loss is occasioned rather by floods from the land than the perils of the sea.

If salvage were allowed, in such cases, to every one who chose to interfere, and take possession of the rafts which he saw floating down the river, property of great value might,



and probably would, often be withheld from the owner, upon claims for salvage services; and this, too, under circumstances where the owner would have desired that the party should not interfere; and where the service, if any was really rendered, cost him very little time or trouble. And we might, moreover, have a libel in admiralty for salvage, upon every piece of timber cast on the shore from a broken raft.

Undoubtedly, when a raft is broken up and scattered, any one may lawfully take measures to save it from further loss, and secure the property for the owner; but, as was said by the court in the case of *Nicholson v. Chapman*, it is rather a case of mere finding than of salvage service; and whatever just claim the party may have to a reasonable compensation for his trouble and time, he has no right to detain the property when the owner demands it; and if he does, it may be recovered in an action of replevin, in a court of common law.

The result of this opinion is, that these rafts, anchored in the stream, although it be a public navigable river, are not the subject-matter of admiralty jurisdiction, in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognised as instruments of commerce or navigation by any act of congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port. And any assistance rendered to these rafts, even when in danger of being broken up, or swept down the river, is not a salvage service, in the sense in which that word is used in the courts of admiralty. And this seems always to have been the view taken of this subject; for, notwithstanding the great extent of this trade, and the number of years it has been carried on, this is the first instance in which a claim for salvage has been made in the court of admiralty, for arresting a raft which was driven from its anchorage. The dis-

trict court, therefore, had not jurisdiction to issue the process by which the marshal was directed to take the property from the possession of the respondent; the controversy was proper for the decision of a court of common law, and the remedy of the owners to regain the possession, was an action of replevin, and not a libel in the district court; consequently, its decree must be reversed, and the libel also dismissed.

The lumber having been taken from the respondent's possession, by process which the district court had not jurisdiction to issue, a writ of restitution would be awarded, if there was any question between them, as to the right of property, or the right of possession, which this court considered as an open one. But the respondent claims no property in the lumber; he claims the possession only, upon the ground that the services he rendered were salvage services, under the maritime law. And as the court is of the opinion that the services were not of that character; and that he had no right to withhold the property from the owners; it would be unreasonable and unjust to deprive the owner of the possession he has obtained, merely to subject him to the necessity of recovering it again in a new suit, in a court of common law. The court will not, therefore, disturb the possession of the libellants; but as they brought the controversy into the court of admiralty, and have failed to support their libel, they must be charged with costs, as well in *this*, as in the district court.

*Cornelius McLean* and *Geo. W. Williams*, for libellants.

*Wm. F. Giles*, for respondent.

UNITED STATES  
vs.  
THE BARQUE ANNA.

The second section of the passenger act of 1819, is repealed by the tenth section of the act of 17th May 1848.

The tenth section of the act of 1848, in repealing the first section of the act of 1819, regulating the number of passengers, repealed all other parts of the law which inflicted penalties and forfeitures for breaches of the rule thereby established.

The act of 1848 designed to repeal altogether the rule of apportionment of passengers, *by tonnage*, and to establish that provided by the act of 22d February 1847, as the only one by which the ship-owner was to be governed.

The act of 22d February 1847, § 1, provides that, if the master of a vessel shall take on board, at a foreign port or place, a greater number of passengers, in proportion to the space appropriated for their use, than is therein specified, *with intent to bring such passengers to the United States*, and shall leave such port or place with the same, *and bring the same, or any number thereof*, within the jurisdiction of the United States, the master shall be deemed guilty of a misdemeanor, and fined fifty dollars, and may be imprisoned for a term not exceeding one year. The proportion prescribed by this section is, one passenger for every fourteen clear, superficial feet on the lower deck or platform; this space to be unoccupied by stores or other goods not being the personal luggage of such passengers; if the vessel is to pass through the tropics, the proportion is required to be twenty superficial feet, instead of fourteen. The second section subjects the vessel to forfeiture, in case the passengers "*so taken on board and brought into the United States*," shall exceed, by twenty, the number limited in the first section: *Held*, that the words "*so taken on board and brought into the United States*," refer to the whole provisions of the preceding section; they refer to the entire transaction there described, to the *taking on board* the forbidden number, as well as to the bringing them, *or any number of them*, into the United States.

The taking on board, the intent at the time, and the bringing into the United States, are all constituent parts of the offence; it is consummated by the entry of the vessel into one of our ports, with any portion of the passengers on board, who have been exposed to the maladies and diseases incident to an overcrowded ship on such a voyage. If congress had intended to make the offence depend upon the number brought in, and that the number taken on board should not constitute a part of it, then the words "*so taken on board*" ought to have been omitted.

The vessel is forfeited, if, when she left her European port for the United States, with one hundred and eighty-five passengers, the space occupied by them was not in the proportion of fourteen superficial feet to each passenger; and she is equally liable to forfeiture, if that proportion of the space was diminished at any time during the voyage, unless it was necessary, for a time, by the dangers of the sea.

The eighth section of the act of 17th May 1848, does not repeal or modify any of the regulations of the act of 1847.

The two acts (1847 and 1848) relate to the same subject-matter, are intended to accomplish the same object, and must be construed together; the eighth section of the act of 1848, when it speaks of the number of passengers to be taken on board and brought into the United States, refers to the numbers provided for in the act of 1847, and makes no new provision on that subject.

A measurement of the vessel, and a statement placed on the files of the custom-house, specifying the number of passengers she is entitled to transport, is not conclusive upon the government, as evidence of the capacity of the vessel.

It is the duty of the ship-owners to know how many they can legally transport; and if the fact is disputed, it is for the judiciary to decide upon the whole testimony.

The question of forfeiture or not must be determined by the *actual* capacity of the surface appropriated to the use of the passengers.

Where the space occupied by certain boxes on the berth-deck of a passenger vessel, was lawfully so occupied, if the boxes contained luggage belonging to the passengers, and was unlawfully so occupied, if they did not, it is incumbent on the United States, in a proceeding for the forfeiture of the vessel, to show what was the contents of such boxes, in order that it may be known whether the offence operating the forfeiture has been committed.

The act of congress regulating the mode of transportation, is intended, not only for the protection or convenience of the passengers, but also to guard our own cities from disease, and from the burden of supporting a multitude of persons brought to our shores with their health broken on the voyage, by overcrowding them in the ship, or feeding them with unwholesome food; and when the law has regulated the manner of transportation, and prescribed the proportion which the number of passengers shall bear to the space appropriated to their use, neither their assent nor request, nor their supposed convenience, will justify the master in violating the provisions of the statute.

In a proceeding for the forfeiture of a vessel under the passenger acts, a cause of forfeiture, not made a charge against the master and ship-owners, which is not one of the grounds upon which the forfeiture is claimed, and which was not noticed in the district court, is not properly before the circuit court, on appeal.

Circuit Court, November Term, 1854. Appeal from the District Court, in Admiralty.

The libel in this case was filed in the district court, on the 27th of December 1853, against the barque Anna, a foreign vessel, belonging to the port of Bremen. It claimed a forfeiture of the vessel, for a violation of the acts of congress relating to the transportation of passengers to the United States from foreign countries.

The forfeiture was claimed on the ground that, on the 20th day of October 1853, Heinrick Raschen, then, and up to the time of the seizure, being master of the said barque, (she being of 275 tons burden) took on board, at the port of Bremen, 235 passengers, who were above the age of one year, 231 of whom were passengers other than cabin passengers, *with the intent to bring them to the United States*; and did leave said port with said passengers, all of whom, with the exception of twelve who died on the voyage, were brought by the said barque into the port of Baltimore, where she arrived about the 18th of December 1853; which number of passengers, thus brought into the port of Baltimore, was an excess of more than twenty passengers over two passengers for every five tons of said barque, contrary to the provisions of the second section of the act of congress, approved the 2d of March 1819, entitled "An act regulating passenger ships and vessels."

That the space on said barque, appropriated to the said 219 passengers, other than cabin passengers, who were so brought into the port of Baltimore, and occupied by them, and unoccupied by stores and other goods, not being the personal luggage of said passengers, was only 2684 superficial feet of the lower deck or platform on which said passengers were accommodated; which number of passengers was an excess of more than twenty over one passenger for every fourteen clear superficial feet of deck so appropriated and occupied; contrary to the provisions of the second section of the act of congress approved the

22d day of February 1847, entitled "An act to regulate the carriage of passengers in merchant vessels."

That the portion of said barque appropriated, during said voyage, to 174 of the above-described passengers, other than cabin passengers, who were brought into the port of Baltimore, was between decks, and the space appropriated to them and occupied by them, and unoccupied by stores or other goods, not being the personal luggage of said passengers, was only 2054 superficial feet of the lower deck or platform on which said passengers were accommodated, and carried during said voyage; which was an excess of passengers of more than twenty over one passenger for every fourteen clear superficial feet of deck so appropriated and occupied; contrary to the provisions of the second section of the said act of congress approved the 22d day of February 1847.

That the portion of the said barque Anna, appropriated to 186 of said passengers, other than cabin passengers, received on board said barque at Bremen as aforesaid, with intent to bring the same to Baltimore as aforesaid, was between decks, and the space appropriated to them and occupied by them, and unoccupied by stores or other goods, not being the personal luggage of said passengers, was only 2054 superficial feet of the lower deck or platform on which said passengers were accommodated and carried; that twelve of said passengers died after leaving Bremen, and before her arrival in the United States; that said passengers so received at Bremen, *with intent to be brought to Baltimore*, were an excess of more than twenty, to wit, an excess of forty passengers over one passenger for every fourteen clear superficial feet of deck so appropriated to and occupied by said one hundred and eighty-six passengers so received at Bremen as aforesaid; contrary to the provisions of the second section of said act of congress, approved the 22d of February 1847.

The answer of Hermann von Kapff, claimant of said barque, in behalf of her owners, after stating the ownership of the barque and the illegality of her seizure, alleged that said barque belonged to the port of Bremen in Germany

and was of the capacity of 383 tons. That on the 3d day of November 1853, Henry Raschen, being then and ever since, the master of said barque, she sailed from Bremer Haven, the port of Bremen, bound for Baltimore, with 234 passengers on board, of whom four were cabin passengers, forty-nine were second cabin or steerage passengers on deck, and one hundred and eighty-five were between-deck passengers; that the whole number of passengers was, as above stated, 234 and not 235, as alleged in the libel; that 230 were passengers other than cabin passengers, and not 231, as stated in the libel; and that eleven died on the passage and not twelve as stated in the libel. That all of said passengers, except those who died as above stated, were brought by said barque into the port of Baltimore, where she arrived about the 20th of December 1853. He admitted that said number was more than an excess of twenty passengers over two passengers for every five tons burden of said barque, but he denied that such excess was any ground of forfeiture, or in any wise contrary to law; on the contrary, he alleged and believed it to be true, that said barque was by law authorized to take and carry between-decks alone 192 passengers, as would appear by a draft of the between-decks of said barque and measurement thereof, prepared and certified to by Robert C. Barnes, measurer of the United States for the port of Baltimore, and furnished by said Barnes to Captain Raschen, and filed with the answer, and which measurement he had a right to suppose to be correct. He denied that there were 219 passengers brought in said barque into the port of Baltimore, on the lower deck or platform called the between-decks of said barque, and alleged that the number actually brought into said port of Baltimore on said lower deck was 174; but he did not believe it to be true, and therefore denied, that the space appropriated to them and occupied by them and unoccupied by stores or other goods, not being the personal luggage of said passengers, was only 2054 superficial feet of the lower deck or platform on which said passengers were accommodated and carried, during said voyage, as is charged in said libel.

A voluminous mass of testimony was taken in the case, the substance of which is fully stated in the opinion of the court. The libel was dismissed by the district court, and appeal taken to this court.

TANEY, C. J. I shall affirm the decree of the district court in this case. But as it is the first that has come before this court under the acts of congress regulating the transporting of passengers, and involves several questions which have been strongly contested in the argument, it is proper that I should state fully the grounds upon which my opinion is founded.

The barque Anna sailed from Bremer Haven, in November 1853, and arrived in the port of Baltimore in the December following; she took on board at Bremer Haven, on the lower deck or platform, one hundred and eighty passengers, with intent to bring them to the United States, and left the port with that number on board; the cholera made its appearance among them on the day she sailed, and eleven passengers died on the voyage; she brought into the United States one hundred and seventy-four. Upon her arrival at the port of Baltimore, she was seized as forfeited to the United States, for a violation of the passenger laws; and it is contended on the part of the United States that she is liable to forfeiture under the acts of congress of 1819 and 1847, on account of the number of her passengers beyond those authorized by those laws.

The testimony in the case is exceedingly voluminous, and before I examine it, it is necessary to dispose of some questions of law which have been raised on the construction of these acts of congress.

In relation to the act of 1819, I think it quite clear, that the libel cannot be maintained under the law. The first section prohibited any vessel from taking on board or bringing to the United States, more than two passengers for every five tons of such vessel, and inflicted certain penalties on the master and owners who should be guilty of violating this



provision; and by the second section, if the number of passengers should exceed the proportion of two to every five tons, by twenty, the vessel was forfeited. But this regulation is repealed by the tenth section of the act of 17th May 1848. It is true, the repealing clause speaks only of the first section; but it is that section which regulates the number of passengers by the tonnage of the vessel; and in repealing that regulation altogether, they certainly repealed all other parts of the law which inflicted penalties and forfeitures for breaches of the rule thereby established. It cannot be supposed that congress intended, by the repealing clause, to exempt the master and owners from the pecuniary penalty inflicted on them by the first section, for a breach of this law, and retain the heavier penalty of forfeiting the ship; such a construction would be unreasonable. It is evident that the act of 1848 designed to repeal altogether the rule of apportionment, by tonnage, and to establish the one provided by the act of 22d February 1847, as the only one by which the ship-owner was to be governed.

The act of 1847 is supposed to present a question of more difficulty; but, after a careful examination, I think it will be found free from doubt. The first section provides that, if the master of a vessel shall take on board, at a foreign port or place, a greater number of passengers, in proportion to the space appropriated for their use, than is therein specified, with intent to bring such passengers to the United States, and shall leave such port or place with the same, *and bring the same, or any number thereof*, within the jurisdiction of the United States, the master shall be deemed guilty of a misdemeanor, and fined fifty dollars, and may be imprisoned for a term not exceeding one year. The proportion prescribed by this section, is one passenger only for every fourteen clear superficial feet, on the lower deck or platform, this space to be unoccupied by stores or other goods, not being the personal luggage of such passengers. If the vessel is to pass through the tropics, the proportion is required to be twenty superficial feet instead of fourteen.

The second section subjects the vessel to forfeiture, in case the passengers "so taken on board and brought into the United States," shall exceed, by twenty, the number limited in the first section.

The claimants contend that the barque cannot be condemned, although there may have been an excess of twenty passengers in proportion to the space, when she sailed, unless there was a like excess when she entered the United States, that is, that although the 185 which she took on board at Bremer Haven, may have exceeded, by twenty, the proportion to the space prescribed by the act of congress, yet she is not forfeited, unless the 174 which she brought into the United States, also exceeded, by twenty, the number which could lawfully be accommodated in the space appropriated to the use of the passengers.

But this construction cannot be maintained, either upon the grammatical or fair construction of the act of congress, or upon its evident object and policy. The words "so taken on board and brought into the United States," refer to the whole provisions of the preceding section, they refer to the entire transaction therein described, to the taking on board the forbidden number, as well as to the bringing them, or any number of them, into the United States. The taking on board, the intent at the time, and the bringing into the United States, are all constituent parts of the offence; and it is consummated, by the entry of the vessel into one of our ports, with any portion of the passengers on board, who have been exposed to the maladies and diseases incident to an overcrowded ship on such a voyage. If congress had intended to make the offence depend upon the number brought in, and that the number taken on board should not constitute a part of it, then the words "so taken on board," ought to have been omitted.

There is certainly nothing in the object and policy of the law to induce the court to restrain the operation of this clause of the statute, within narrower limits than its language naturally and justly imports. Before congress legis-

lated upon the subject, the transportation of passengers to this country, was, in many instances, conducted in a manner that shocked the moral sense of the community; the ships were crowded to excess; the places allotted to the passengers not ventilated; and they were often, during the voyage, fed upon unwholesome food, or restricted to a very scanty allowance. The natural result was, that ships were continually arriving with contagious and infectious diseases on board; and after having lost, on the voyage, a great portion of the passengers, brought the survivors into the country, so emaciated with disease, as to become a public burden, and often introducing contagious and infectious maladies contracted on shipboard, endangering thereby the health and the lives of our own citizens.

It was to prevent these evils, that congress passed the act of which we are speaking, as well as the other statutes upon the same subject. It is the duty of the court to interpret them, and execute them in the spirit in which they were enacted by the legislature; to give to the words of the law a fair and just interpretation with reference to the object intended to be accomplished; and to inflict the penalty prescribed by the act, whenever its provisions have been disregarded. The construction contended for by the claimant, would make the act perfectly nugatory; for, if the ship-owner crammed his vessel, like an African slave-trader, and fed his passengers upon food injurious to health, he would be perfectly sure, that all of those taken on board would not live to be brought within the jurisdiction of the United States; and that they would be sufficiently thinned before the voyage was over, to have, upon their arrival, the proportion of fourteen superficial feet for the number who survived. It is impossible to suppose that congress contemplated such an object, nor have they, in my judgment, used words which lead to such a conclusion; but have required that the space allotted to the passengers should be in the proportion specified in the law, when the vessel leaves the foreign port, and should be preserved throughout the voyage, in proportion to the numbers thus taken on board.

This vessel, therefore, is forfeited, if, when she took her departure from Bremer Haven, with one hundred and eighty-five passengers, the space occupied by them was not in the proportion of fourteen superficial feet to each passenger; and she is equally liable to forfeiture, if that proportion of the space was diminished, at any time during the voyage, unless it was made necessary, for a time, by the dangers of the sea.

Nor does the eighth section of the act of 17th May 1848 repeal or modify this provision of the act of 1847. The section referred to in that act, relates entirely to the size and height of the berths; and if the construction given to it by the claimant was the true one, and it was necessary to show that the whole number of passengers taken on board, were brought in, before the vessel could be condemned under the section referred to, yet the provision extends only to the regulation of the berths, and is confined to forfeitures on that account. It does not repeal any of the regulations in the act of 1847; nor is it, in any respect, inconsistent with them. If the construction of the claimant was admitted to be the true one, the regulations of both acts would still stand, and be in force; the forfeiture under the act of 1848 being confined to the defect of the berths, and not affecting in any degree the provisions of 1847, which forfeits for the want of space for the passengers and their luggage. The act of 1848 was passed to provide additional security for the health of the passengers, and not to impair or lessen the security provided by the previous law.

But the construction given to the last-mentioned law by the claimant, cannot be maintained, even where the forfeiture is demanded on account of a defect in the berths. The two acts relate to the same subject-matter, are intended to accomplish the same object, and must be construed together; the eighth section of the last act, when it speaks of the numbers to be taken on board and brought into the United States, refers to the numbers provided for in the act of 1847, and makes no new provision on that subject.

These being the regulations of law upon this subject, I proceed to examine the testimony, as far as it is material to the decision of the case. There is a good deal of controversy, as to the number of superficial feet on the deck occupied by the passengers; but it is unnecessary to incumber this opinion with the multitude of figures and calculations brought forward in the testimony. It is sufficient to say, that the evidence proves to the satisfaction of the court, that the deck was large enough to accommodate one hundred and eighty-five passengers, and no more, according to the space prescribed by the act of congress. In ascertaining the superficial contents of a ship's deck, some difference will occasionally take place, where it is measured, at different times, by different persons; the width of the ship from stem to stern not being the same, the average width by which the contents are to be calculated, when ascertained by different lines in different sections of the vessel, will necessarily vary in some degree from each other. But the difference between the witnesses in this case is greater than ought to exist, if all of the measurements had been made with ordinary care and skill, and the wide difference between them shows that some must have been loosely or unskilfully made. Upon weighing the whole testimony, I think she was capable of accommodating the number of passengers above mentioned, and no more.

It appears, that some years ago a measurement was made of this vessel, and a statement placed on the files of the custom-house in Baltimore, by which she was entitled to transport one hundred and ninety-two passengers on this deck; a copy of this statement was given to the master of the barque, and on several voyages preceding the one in question, he has brought to this port the number of passengers specified in that statement, without objection. And the respondent now contends, that this certificate, thus placed in the hands of the master, and acted upon by him in former voyages, is conclusive upon the government; and that in determining whether the number taken on board in

this instance exceeded, by twenty, the legal number, the capacity of the vessel ought to be rated at one hundred and ninety-two. But this point is altogether untenable. The act of congress does not authorize any particular officer to make the measurement, or to give a certificate to the master; it is the duty of the ship-owners to know how many they can legally transport; and if the fact is disputed, it is for the judicial power to decide upon the whole testimony.

Indeed, if such a principle should be sanctioned by the court, it might lead to flagrant abuses. This case itself shows its evil tendency; for here is a vessel proved, upon careful measurement, to be able to accommodate legally only one hundred and eighty-five passengers, and yet the master is in possession of a certificate from an officer of the customs, founded upon some measurement made loosely, or under improper influences, which rates the capacity of the vessel at one hundred and ninety-two. And under the protection of this certificate, it appears, has been illegally crowding passengers in former voyages, and carrying on the trade, in direct contravention of the act of congress.

The question of forfeiture or not must be determined by the actual capacity of the surface appropriated to the use of the passengers. As I have already said, the whole deck of the barque Anna afforded space for one hundred and eighty-five; but a bulkhead was put up abaft the mizen mast, very soon after the vessel left Bremer Haven, and the space between this bulkhead and the stern, was filled with cargo or stores, and the passengers excluded from it. There is some controversy about the exact extent of the space thus cut off; but from the whole evidence, I think it is shown, that it contained superficial feet enough for the accommodation of fifteen passengers, according to the proportion prescribed by law. This left room for only one hundred and seventy, while one hundred and eighty-five were on board; here, then, is clearly an excess of fifteen above the legal number. But this excess does not forfeit the vessel;

it must amount to five more, that is, to twenty, before a forfeiture can be claimed.

In order to show that the space was still further curtailed, it is insisted on the part of the United States, that another bulkhead was made, from one to three feet forward of the foremast, by placing hogsheads on their ends, across the ship, from side to side, so as to prevent the passengers from passing beyond it, and that the space between this bulkhead and the apron of the ship, was filled with boxes and chests, and that those boxes and chests, for the most part, if not altogether, contained cargo, and was not appropriated to the use of the passengers or their personal luggage; and if this allegation can be maintained, the vessel is undoubtedly forfeited, for this bulkhead would cut off far more than space for five passengers, and make the illegal excess placed between these bulkheads much greater than twenty.

But this allegation is denied by the respondents, and they insist, that the hogsheads spoken of were only two bread-casks, which had (after being emptied) been brought up from the hold and filled with potatoes; that the potatoes were a part of the provisions for the voyage, and were originally placed in the hold of the vessel; but that from storms experienced during the voyage, the hold had become damp, and the potatoes were spoiling, and that they had been brought up to be picked and dried, and suffered afterwards to remain there because they were more accessible to the passengers; and that there was room on each side of them to pass forward. That the boxes and chests placed there contained the personal luggage of the passengers, with the exception of two or three boxes which contained beds or bedding, or some trifling articles of household furniture, upon which he had charged no freight; that, like the potatoes, they had become wet from the effect of severe storms, and were, at the request of the owners, brought up to dry, and suffered afterwards to remain. This is the main point in the dispute, and it has appeared to the court from the first state-

ment of the case, that it must turn upon the decision of this part of the controversy; and many witnesses have been examined upon it by the parties, to support their respective allegations.

It is proper to observe, that there were no berths forward of the foremast; they were all between the after-bulkhead and the foremast, and there were on each side of the deck, a line of chests and boxes, in front of the berths, containing personal luggage of the passengers. But it does not, by any means, follow that these rows of chests and boxes along the berths contained all the personal luggage which passengers brought with them, and which might lawfully be placed within the space allotted to their use. Every passenger whose means would afford it, undoubtedly, brought with him apparel of a different quality, from that which he used in a rough exposure of a sea-voyage in a crowded ship; and this apparel was a part of his personal luggage which, to a reasonable amount, might legally be placed in the space appropriated to the passengers. And as the boxes and chests containing it, would not probably be opened until they arrived in port, it would be more convenient to the passengers, to place them in the forward part of the barque, than to pile them up in front of the berths. If, therefore, the hogsheads did not block up the passage to this part of the vessel, and these chests and boxes were of this description, the space in question must be regarded as actually appropriated to the use of the passengers and their personal luggage.

Now, as the United States claim the forfeiture, it is incumbent on them to prove that the offence was committed; they must prove that the articles in question, were not such as could legally be placed in the portion of the barque allotted to the use of the passengers. But I see nothing in the testimony of the witnesses, adduced on the part of the prosecution, that can be regarded as proof of this fact. The custom-house officers saw chests and boxes there, filling up the space, and a coil of rope on one of the boxes; but



they did not require them to be opened; they do not know what they contained, and they appear to have looked at them in a cursory and hasty manner, merely for the purpose of ascertaining whether any passengers were concealed among them. Some of these witnesses, indeed, suppose they contained cargo, because, as they say, they remained there after the passengers had left the ship; but from the slight examination given by them to these articles, it is perfectly impossible they could, with certainty, determine whether the chests and boxes seen there afterwards, were the same that they found there when they boarded the vessel. Indeed, so slight was the examination, that it is not very clear whether there were two or three casks blocking up the way, or whether there were or were not boxes at their sides.

It would be contrary to the first principles of justice, to convict an individual of an offence upon testimony like this. It was in the power of the officers of the government, to have these boxes and chests opened; to examine their contents, and to prove positively, directly and plainly, that they did not contain the personal luggage of the passengers, if such was the fact. And with such proof within their reach, and omitting to obtain and produce it, the seizure cannot be maintained, upon testimony so vague and inconclusive as that now offered; which does not speak from the actual knowledge of the witnesses, but consists of remote and doubtful inferences, which may or may not be correct. The coil of rope of which they speak, is proved to have been placed there after the vessel came into port.

In these remarks upon the testimony in support of the seizure, I have not intended to embrace the testimony of Doctor Palmoyer, who was one of the passengers in the barque. In relation to him, it is evident, from his own testimony, that he is a man of very excitable temperament, was engaged in very violent quarrels with the master and mate of the vessel, during the passage, and gives his testimony under the influence of strong feelings of resentment.

Besides, he was a passenger on the upper or spar-deck, and his knowledge of the situation of things between decks was obtained, for the most part, in occasional visits to patients to whom he was called. With his attention necessarily drawn to the sick, and without any particular motive for an attentive examination of the luggage or cargo, his recollections, at the time he gave his testimony, could not be very accurate or distinct, and would unavoidably be discolored, in his own mind, by the strong feelings under which he was acting; without intending to impeach his integrity, or to impute to him a wilful departure from the truth, yet, it would be unsafe and unjust to act upon it; for he is in conflict with the evidence given by all the other passengers who were examined, and who had better means of knowledge, as they were passengers between decks. Therefore, I put his testimony aside; but I doubt whether, if contradicted by others, and above all suspicion, it ought to be deemed, in a court of justice, sufficient to support the seizure, when, as in this case, the officers of the custom-house had it in their power to obtain positive and indisputable proof, by actual inspection, and yet have omitted to do so.

It appears, indeed, by the respondent's own showing, that some part of the space forward of the foremast was illegally occupied. Undoubtedly, he might lawfully bring up the potatoes and the household furniture of the passengers, for the purpose of drying them, after they had become damaged or wet by the storm, and he might temporarily keep them there for that purpose, but it was his duty to remove them as soon as this object was accomplished; for the ship-owners were bound to see that the ship was seaworthy, and capable of transporting her cargo and provisions without encroaching on the space appropriate to the use of the passengers. The hogsheads with potatoes, and the chests or boxes, with bed and bedding, or bureaus, or other household furniture, were certainly not the personal luggage of the passengers. Nor would their consent or supposed convenience justify this encroachment. The act of congress regulating the

mode of transportation, is intended not only for the protection or convenience of the passengers, but also to guard our own cities from disease, and from the burden of supporting a multitude of persons brought to our shores with their health broken on the voyage, by overcrowding them in the ship, or feeding them with unwholesome food. And when the law has regulated the manner of transportation, and prescribed the proportion which the number of passengers shall bear to the space appropriated to their use, neither their assent nor request, nor their supposed convenience will justify the master in violating the provisions of the act of congress.

If the articles, thus illegally placed on the deck, occupied the space which the law requires for five passengers, the vessel would, undoubtedly, be subject to forfeiture; for, as the whole deck was sufficient for only the one hundred and eighty-five passengers with which she sailed, and the space for fifteen had been cut off at the stern, if the space for five more was unlawfully occupied in the forward part of the vessel, it would make the passengers exceed, by twenty, the number which could be legally taken on board, in the space occupied by them and their personal luggage.

But the space occupied by these unlawful obstructions was not measured; even the number of hogsheads, and of boxes or chests containing household furniture, is not very clearly established, and the evidence of their dimensions are loose estimates, very little better than conjecture. When the burden of proof is on the prosecution, testimony of this character is entirely insufficient to convict the party. It is very true, that the master and owners, in this case, are not entitled to any favorable construction of their acts and motives; for it is proved beyond doubt, that almost immediately after leaving Bremer Haven, he put up the bulkhead at the mizen mast, with one hundred and eighty-five passengers on board, thus wilfully and deliberately violating the act of congress, by overcrowding the space remaining for the passengers he had taken, even if his vessel had

been authorized to transport one hundred and ninety-two, according to the certificate he had obtained. This curtailment of the space was not sufficiently great to forfeit the vessel, but it is quite sufficient to make it the duty of the court to scrutinize carefully his defences, and to listen with caution to the excuses he may offer, when he is professing to act by the request of the passengers, or for their convenience. Yet, however indefensible his conduct may have been, there is no evidence to justify a decree of condemnation.

It has been suggested, that the passengers brought on the spar-deck, in what was called the second cabin and the steerage, were unlawfully placed there, and that under the true construction of the acts of congress, that deck ought to be free, for exercise and fresh air, for the passengers on the deck below; and if this be the construction of the law, there was clearly an excess of more than twenty beyond the number which could be lawfully transported. But, although the libel and answer, and testimony show the number of passengers in the cabin, second cabin and steerage, on the upper or spar-deck, still this circumstance is not made a charge against the master and ship-owners; nor is the forfeiture of the ship claimed on this ground; nor was that point made in the district court. The point suggested is therefore not properly before me on this record, and I abstain from expressing any opinion upon it. Testimony as to the purposes to which the spar-deck was usually applied, when the act of 1847 was passed, may perhaps be necessary to enable the court to decide this question.

For the reasons hereinbefore stated, the decree of the district court must be affirmed.

*Wm. Meade Addison*, for appellants.

*Brown & Brune*, for appellee.

## ESTATE P. COHEN and ANDREW J. COHEN

vs.

THE BRIG MARY T. WILDER, E. B. CUNNINGHAM, Master,  
and SAMUEL PATTERSON, Claimant.

Where a vessel was at anchor at night, in the Patapsco river, in the channel through which sea-going vessels must pass in going to and from Baltimore, with no light set and no look-out, the wind blowing an eight knot breeze, and was run into by another vessel: *Held*, that there was gross negligence on the part of the vessel at anchor.

In the position in which she was anchored, it was her duty to have shown a light, during the period of darkness, and also to have had a look-out, competent to perform his duty, and who diligently performed it.

The omission either to set a light, or to have a competent look-out, was culpable negligence, and made the vessel liable for any damage another vessel might sustain by running into her in the dark, unless the colliding vessel was also in fault, and contributed to the disaster by some want of care or skill on her part.

But if the disaster was, in any degree, occasioned by the want of proper care and vigilance on the part of the vessel under weigh, she must share the loss, notwithstanding there was gross negligence on the part of the vessel at anchor.

The want of a light on board the colliding vessel cannot affect the case, as this did not in any degree contribute to the disaster, and could have exercised no influence in preventing it; inasmuch as there was nobody on the deck of the vessel at anchor to see it, and to exhibit a light in return, or to hail the other vessel on her approach.

Circuit Court, November Term, 1856. Appeal from the District Court, in Admiralty.

The libel in this case was filed on the 11th of November 1854, by the appellants, owners of the barque Phantom, to recover damages sustained by said barque coming into collision with the brig Mary T. Wilder, on the night of the 3d of November 1854, whilst the said brig was lying at anchor at the mouth of the Patapsco river.

The libel was filed against the brig and her master, and

the vessel was attached to abide the result, but released on the proper stipulation being entered into by Samuel Patterson, the claimant, on the part of her owners, who resided in the state of Maine. An answer to the libel was filed by Enoch B. Cunningham, master of the brig, on his own account, and on account of said Samuel Patterson, claimant, on behalf of the owners. The evidence adduced on both sides is substantially stated in the opinion of the court.

The libel was dismissed with costs, in the district court (GILES, J.), and an appeal was taken, and argued in this court.

TANEY, C. J. This is an appeal from the decree of the district court of the United States for the district of Maryland, dismissing the libel filed by the appellants. The appellants are the owners of the barque Phantom, and the libel was filed to recover damages for injuries sustained by the barque in a collision with the Mary T. Wilder. The collision took place in the Chesapeake Bay, on what are called the five fathom shoals, which are about five miles below the mouth of the Patapsco.

It appears that the brig Mary T. Wilder came up the bay on the 2d of November 1854, and anchored on the five fathom shoals about two o'clock in the morning of the third. These shoals are in the channel through which sea-going vessels are obliged to pass in going to and from Baltimore; and such vessels frequently anchor there; the channel at this place is about a mile and a half wide, and narrower further up. On the night of which I am speaking, there was a bright moon, and vessels could be seen at a considerable distance, until the moon went down; it set about five o'clock in the morning, and the sun rose about half past six; and in the interval between the going down of the moon and broad daylight, it was very dark, with a vapor on the water, which made it difficult, if not impossible, to see a vessel at anchor, and without sails, at the distance of a

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hundred yards. There was a fresh wind from the southwest, during the night, which was a free wind for vessels bound to Baltimore, and strong enough to bring them up at the rate of eight miles an hour, when under full canvas. The Mary T. Wilder came up without a pilot, and had none on board when the collision happened; she had no light during the night, nor any look-out.

It is true, that the witnesses on the part of the respondents state, that the cook of the brig had the watch on deck. But he says he went up to his watch when the moon was just setting, at about half-past four, and went below again at five; and thinks he could not have been down five minutes before he felt the shock of the collision; that he had not seen the barque Phantom, to notice her, before he went below; that he did not notice her, because it was light enough for any vessel to be seen; and that he had never been up the Chesapeake before, and did not notice how the wind was blowing. Certainly, such a watchman (if he can, with any propriety, be called by that name) cannot be regarded as a look-out, such as the law requires, even if he had remained on deck; but at the time of the collision, no one was on deck; every man on board was asleep except the cook, and he was below taking refreshment.

Upon this evidence, it is too clear to be disputed, that there was gross negligence on the part of the Mary T. Wilder. In the position in which she was anchored, it was her duty to have shown a light during the period of darkness; and also to have had a look-out competent to perform the duty, and who diligently performed it; ordinary prudence required both of these precautions, independently of any established usage on the subject; and the omission of either was culpable negligence, and made the vessel liable for any damage another vessel might sustain, by running into her during the period of darkness, unless the colliding vessel was also in fault, and contributed to the disaster by some want of care or skill on her part.

This brings me to the testimony in relation to the management of the Phantom. This vessel had a pilot on board, under whose direction she had come up the bay, bound for Baltimore; she had shortened sail some time before the collision, in order that she might not enter the river Patapsco before daylight, and was going at the rate of only four or five miles an hour. It was the first mate's watch, and he states that he had with him a look-out stationed on the top-gallant forecastle, and two on the bow, looking over the rail, and a competent seaman at the helm; that he himself was standing on the larboard side of the deck, when the man on the forecastle sang out, that there was a vessel on the starboard bow; that he immediately went over to that side and saw the vessel, and sang out to the man at the wheel to starboard his helm, which he did; but before she would answer her helm, she struck the other vessel, and at that time it was so dark, that he could not see a man from one end of the vessel to the other. The testimony of the mate is substantially corroborated by that of the pilot, who was heaving the lead at the time the alarm was given. It is true, there are some discrepancies between them, as to the time occupied in particular transactions, and the distance at which a vessel at anchor might be seen; and some, indeed, in different parts of the pilot's own deposition. But these discrepancies are not of sufficient importance to impair, in any degree, their credit as witnesses; such estimates of times and distances, are always and necessarily vague and indefinite, being generally made from recollection afterwards, and almost always vary to some extent, when made by different men, in relation to the same transaction.

The pilot testifies to the darkness of the weather, the sufficiency of the look-out, the difficulty of seeing a vessel at anchor until near to her, if she had no light; and to the propriety of the measures taken to avoid the collision, after the Mary T. Wilder was discovered; he also swears that



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the vessels were entangled for thirty-five or forty minutes, and that the day had just broken when they got clear.

The master of the *Phantom*, it appears, is unable to speak on the subject; he was in bed at the time, and when he hurried on deck, his attention was altogether directed to the vessel alongside, and he did not observe the state of the weather, until after they were separated; he could then see vessels at a distance, but could not say how it was before.

The mate and the pilot, therefore, are the only witnesses on board the *Phantom*, who are able to speak of the circumstances which led to the collision. The sailors who were on the look-out have not been produced by the libellants; but I think their absence is sufficiently accounted for, and throws no suspicion on their case. And the two other pilots examined for the libellants, who were both on the water that night, one in the bay, and the other on the river, and therefore had their attention strongly drawn to the state of the weather, confirm the testimony of the mate and pilot, as to the darkness intervening between the close of the moonlight and the opening of the day, and the vapor upon the water, which rendered it impossible to see a vessel at anchor, without sails, and without a light until you were close upon her.

Standing upon this proof, there would seem to be no ground for imputing negligence to any one concerned in navigating the *Phantom*.

But the respondents contend, that there was light enough to have seen the *Mary T. Wilder* at a greater distance, and in time to have avoided the collision, if the look-outs on the barque had done their duty. And undoubtedly, if the disaster was, in any degree, occasioned by the want of proper care and vigilance on the part of the *Phantom*, she must share the loss, notwithstanding the proof of gross negligence on the part of the brig.

I, however, see nothing in the testimony of the respondents, to impair the weight of the proof offered by the libellants upon this point. As to the light spoken of by the

cook of the brig, when he went below at five o'clock, it was the light of the moon, which set about that hour, as already stated. He says he had not been below more than five minutes before the collision; but he is obviously greatly mistaken in his estimate of the time; for all of the witnesses agree that it was broad daylight when the vessels separated, and as they appear to have been entangled for half an hour or more, the collision could not have taken place at five minutes past five, as the cook supposes, but about six o'clock, or a few minutes before. The light of the moon had faded away long before that time.

As regards the other witnesses who were on board the brig, although they all say they could have seen vessels at a considerable distance, when they came on deck, immediately after the collision, it must be remembered, that they were all aroused from their slumbers by the shock, and their attention exclusively drawn to the vessel actually in contact, and they were not likely to observe how far off they could see other vessels, from which no danger was apprehended. Indeed, it would hardly be just to them, to suppose that they were looking out for distant vessels, when the danger alongside demanded all their attention; and in this respect their testimony is hardly entitled to any weight, when in conflict with the testimony of witnesses who were watching during the whole period of darkness, and whose duty and employment it was, to look out, as far as they could see, in order to guard against danger to themselves. The respondent's witnesses appear to have recollected the light as it was when the vessels separated and they had time to look about them, and to have supposed it was equally bright when the vessels came together. This is obvious from the testimony of the mate; for although he, like the others, speaks of being able to see vessels a good way off, and says he thinks he could have seen one at the distance of three-quarters of a mile, yet he admits that he did not see one and did not look, because his attention was engrossed altogether by the one foul of them;

but he also states that it was dawning day when he came up, and daylight before they got clear. Certainly, the mere dawn of the day would not immediately dissipate the darkness which followed the going down of the moon. The testimony of the mate of the Mary T. Wilder upon this point, tends strongly to confirm, rather than impeach, the testimony of those who were on board the Phantom, as regards the darkness of the weather, immediately before and at the time of the collision.

Neither can the want of a light on board the Phantom influence the decision; it did not in any degree contribute to the disaster, and could have exercised no influence in preventing it; for there was nobody on the deck of the brig to see it, and to exhibit a light in return, or hail her on her approach.

The testimony of Thomas L. Libby, master of the Young Republic, has also been relied on for respondents; he says he was anchored about half a mile below the Mary T. Wilder, with which vessel he had come up the bay, and anchored about the same time with her, that is, about two or three o'clock, when the moon was shining, and a vessel could be seen at a considerable distance; he says the Phantom passed him about five o'clock, and that the moon, according to his time, went down between four and five; she, therefore, passed after the moon had set, and when the darkness was thickening every moment. This agrees with the testimony of the pilot of the Phantom, who says he passed within fifty yards of this vessel, and that the moon was then down; but Libby says it was light enough, at that time, to see the Mary T. Wilder from his vessel. He does not say that he actually saw her, or that he looked towards her; and from the residue of his testimony, it is evident that, if he had made the experiment, he would have proved himself mistaken in this opinion; for, although the Phantom passed so close to him, he did not discover her name on her stern; and although he never left the deck afterwards until daylight, except for a minute or two, and his business

on deck must have been to look out, yet he never saw the Phantom after she passed, until the next morning, after she was clear of the Mary T. Wilder, and had proceeded two miles beyond her up the bay. He appears to have lost sight of her as soon as she passed him, and he did not see her when she was approaching the Mary T. Wilder, nor while she was entangled with her. This is strong evidence of the darkness at that time.

Neither is the omission of the Young Republic, and the other vessels mentioned in the testimony of Libby, to hang out lights any defence to the respondents; it only shows that others were equally careless, but were more fortunate in escaping from the hazards to which they imprudently exposed themselves.

In fine, the testimony shows that the Mary T. Wilder was anchored in a great thoroughfare of navigation, through which vessels were constantly passing in the night as well as the day; that during a period of great darkness, she showed no lights, and had no look-out. And when acts of such culpable negligence are proved, endangering life as well as property, justice requires that she should be held responsible for any injury which another may sustain, unless it can be clearly shown that the colliding vessel might, with due care and vigilance, have prevented the disaster. This, in my opinion, has not been done in this case.

The decree of the district court, dismissing the libel, must therefore be reversed, and a decree passed for the amount of damage found to have been sustained by the appellants, with interest thereon from the 3d day of November 1854.

*Wm. B. Perine*, for appellants.

*Wallis & Thomas* and *T. K. Howard*, for appellees.

## DANIEL GREEN and OTHERS

vs.

## THE SCHOONER ADELAIDE and OWNERS.

A vessel at anchor in a public channel, on a dark and stormy night, without having the proper signal-lights set, can have no claim for damages sustained from a collision with another vessel.

But where such lights are set, and are not seen by the vessel under weigh, until within fifty yards of the other vessel, and unskillfulness is displayed in the measures then used by the vessel under weigh, to avoid a collision, she will be held responsible for the consequences thereof.

Circuit Court, November Term, 1857. Appeal from the District Court, in Admiralty.

This was a proceeding *in rem*, instituted by the owners of the brig Laurel and the owners of her cargo, against the schooner Adelaide, to recover damages sustained by a collision between the two vessels, on the 8th of December 1856.

The libellants charged, that on the 8th day of December 1856, about five o'clock A. M., the said brig being at anchor near Willoughby's point Light-ship (below Hampton roads), under the charge of the pilot, and all hands being on deck with the pilot, preparing to weigh anchor, with a signal lantern hoisted at the forestay; a vessel was perceived coming down upon the brig. As soon as the last-mentioned vessel was perceived thus bearing down, the crew of the brig, or some of them, commenced hailing, to warn the strange vessel, and continued hailing until just before the collision occurred; Captain Hays, the master of the brig, likewise kept waving a hand-lantern on deck for the same purpose, until the collision occurred. The collision took place, and by it the brig had her mainmast carried away, and her covering-board, plank shears, water-ways, and bulwarks broken, and suffered other damage, which she was compelled to put into Norfolk to repair; whereby

the cargo also suffered damage by the delays and expenses incident thereto. The colliding vessel proved to be the schooner Adelaide, of Plymouth, Massachusetts; and if she had kept a proper watch she must have seen the brig lying at anchor, and have heard the hailing from her in time to have prevented the collision.

The defence taken in the answer was, that the schooner had encountered, during the night, a severe storm, and lost her flying-jib, which rendered her unmanageable, and was making for Hampton roads for an anchorage. About five o'clock in the morning, before day, when about two miles east from Willoughby's point Light-boat, the wind still blowing very fresh, and in squalls, from the N. N. W., all hands and officers being on deck, the mate tending the jib-sheets, and keeping a look-out, a vessel was discovered ahead, which proved to be the brig Laurel. The atmosphere was thick and hazy, particularly towards the land, in which direction the brig was, and objects could not be seen far off; the brig had no lights discernible to any one on board the schooner, and the master, and all hands on board the respondent's vessel, thought that the brig was under weigh, and on a different tack from the schooner, and that they would at every moment be receding further and further from each other. The brig, however, was not more than fifty yards off when first seen, and in order to avoid, as far as might be, all possibility of collision, the mate, who was the first person to see the said brig, the moment he saw her, cried out, "heave the helm up," which order was instantaneously obeyed; the schooner began to fall off directly, but the wind was very flawy, and a flaw struck her as she was going off, and prevented her doing so. Soon after the brig was descried, a light was perceived moving about on board of her, which confirmed the impression of those on board the schooner that the brig was in motion; a cry was heard from the brig which those on board the schooner could not understand, and in a moment after another cry, "keep off;" but inasmuch as everything had been done which was possi-

ble on the part of those on board the schooner, from the moment the brig was first seen, to avoid a collision, the warning was of no avail. That the said schooner having lost her flying-jib, and being a flat-bottomed boat, it was impossible to make her tack, except after long and repeated trials, and the last time it had been attempted before the collision, she had failed four times; and the order so given and obeyed, as aforesaid, was the best way of avoiding collision, and would have prevented one, if it had been in the power of those in charge of the said schooner, by any possible means, to do so; but in spite of the most skilful management on the part of those in charge of said schooner, in consequence of the direction and violence of the wind, and the sudden flaw striking her as she was beginning to fall off, she was driven against the said brig. That everything that prudence could suggest was done to avoid collisions and danger of every sort, by those on board the schooner, and inasmuch as a diligent look out was kept by them during the night, they must have seen any lights properly set on board the brig, but as they did not see them, there could not have been any such.

The libel was dismissed by the district court, (GILES, J.), and an appeal was taken to this court. A great deal of conflicting testimony was taken, the substance of which is stated in the opinion of the court.

TANEY, C. J. This is a case of collision; in cases of this description, it almost always happens that there is a conflict in the testimony; and the case before the court is not altogether free from that difficulty.

It is admitted, that the brig *Laurel* was at anchor in the Chesapeake bay, about two miles below the lighthouse on Willoughby's point, the lighthouse bearing west from the brig; it appears, that it is usual for vessels to anchor at that place, and also for smaller vessels, like the schooner, to sail over it. The collision took place about five o'clock, or a few minutes before, in the morning of December 9th,

1856, when the day had not yet dawned; the wind was heavy from N.N.W., and squally, with frequent flaws; the night was starlight with a few scuds; the brig headed about N.N.E., being swung round a little by the flood-tide, it being, as the pilot on board the Laurel says, near the last of the flood.

The first question in dispute is, whether the brig had a signal-light hung out at the proper place; and upon this point there is some contrariety in the testimony. If she had not such a light, the fault was undoubtedly on her part, and she would have no claim for the damage she sustained by the collision. But I think the proof on behalf of the Laurel, is conclusive on this question. The testimony of every witness who was on board the Laurel, concurs in establishing this fact; and it is impossible to doubt it, without imputing to them a concerted plan of misrepresentation; they all speak positively as to the particular period of time at which they noticed the light, and the pilot says he saw it there immediately after the collision. I see no sufficient ground for doubting their truth, or the accuracy of their several statements.

There is some apparent conflict between this evidence and that offered by the respondents, but none, I think, that can impair its weight. These witnesses say they saw no light before the collision, except the lamp brought up by the captain of the Laurel when he heard the alarm. All of this may be very true, they may not have observed the signal-light forward, in the moment of excitement and alarm at the impending collision; their attention was fixed upon the position of the ship which they were so nearly and rapidly approaching, and not upon the manner in which she was lighted. The pilot of the Laurel himself says, that when he came on deck, at the first alarm, he did not observe whether the signal-lamp was burning or not, because his attention was fixed upon the approaching schooner; but went forward immediately after the collision, and saw that it was burning



and in its proper place. The mate of the schooner, indeed, says, that after the collision was over, and the schooner had anchored, he saw the light, and also one aft, put up; the amount of this is nothing more than that he then saw them up; not, I presume, that he saw them in the act of going up; and if he is even understood to mean that he saw when they were actually going up, his testimony would hardly be sufficient to outweigh the concurring testimony of so many witnesses to the contrary; for, it must be remembered, that this witness was the look-out at the head of the schooner, and had strong temptations to acquit himself of the charge of neglect of duty, in not observing a signal-light, until he was within fifty yards of the vessel.

I think, therefore, that no negligence or fault can be imputed to the brig; and the question remains to be examined, whether there was negligence or fault on the part of the schooner. In this part of the case there is no material conflict of testimony; and I take the facts as stated by the witnesses for the respondents.

It appears, that the Adelaide had been all that night beating into the capes, and up the bay, against a heavy head wind; she had lost her flying-jib, and was less manageable on that account, and was endeavoring to reach an anchorage in Hampton roads; she had made her way so far up as to be nearly abreast of the light-boat on Willoughby's point. The wind, as the captain of the schooner states, was about N. N. W., when the Laurel was first seen, and before the helm was put up, the schooner was heading W. N. W., being close-hauled to the wind and with all her sails set; she was standing across the bay from the eastern side, and the Laurel, it appears, was lying at anchor about two miles below, east of the light-boat, and directly in the track of the Adelaide. It was a starlight night, in which a vessel under sail could have been seen at the distance of more than a mile, although she carried no light; the Adelaide was seen by those on board the Laurel at that distance; yet it appears, and is proved by the testimony of the re-

spondents, that no one on board the schooner saw the Laurel, until they had come within fifty yards of her. I do not see how this can be accounted for, except by the want of a proper look-out. It is true, that the mate was stationed, it is said, as a look-out ahead; but it is not sufficient that a person should be stationed as a look-out, and be called a look-out; he must perform that duty, and perform it diligently; and it is impossible to believe, that a vessel like the brig, with a signal-light up, could not have been seen by a diligent look-out on board the Adelaide, long before she approached within fifty yards. The mate says he is an experienced and competent look-out; this may be so; and it may have happened, and probably did happen, that heading a little to the windward of the Laurel, she was hid from their sight by the sails of their own vessel, as they stood upon or walked on the deck; and being unaccustomed, as he says, to the navigation of the Chesapeake, he may have supposed that no vessels anchored in that wide water, and kept his look-out rather for vessels which, with that wind, might be expected to come down the bay. But this is no excuse for the omission; it was his duty to keep a vigilant look out to the leeward as well as to the windward and ahead, and if he had done so, he could not have failed to see the light at a much greater distance. As this negligence produced the collision, the fault was on the part of the schooner, and she is responsible for the consequences. His want of acquaintance with the usages of navigation in the Chesapeake, and the usual places of anchorage, would be no excuse for his omission; he was bound to know, or to have some one on board who knew, the usages and customs of vessels accustomed to navigate these waters, and the places at which they occasionally anchored.

Some testimony has been offered for the purpose of showing, that the light may have been obscured, and the mate of the schooner prevented from seeing it, by a haze on the water, and by an obscurity and darkness produced by contiguous land. As to the haze on the water, the mate himself

says he saw the light after the Adelaide had anchored, after the collision; and the pilot on board the Laurel says, that the Adelaide anchored at the distance of about three hundred yards. And surely if the haze on the water did not prevent him from seeing the lights, after the collision, at the distance of three hundred yards, he ought to have seen them before the collision, at an equal distance, and might and would have seen them, if he had looked out for them in the proper direction. And as to shadows or obscurity supposed to be occasioned by the vicinity of the land; there was no land to the west, to which point she was standing at the time, nor indeed, anywhere else nearer than five miles, and all of it low, with no elevated points; it is impossible that it could have exercised any influence in obscuring the light. I take the distance of the land, as well as of the anchorage of the schooner after the collision, from the testimony of the pilot; he is undoubtedly the most competent judge, and he can have no personal feeling, as his conduct is not impeached on either side.

But even if those on board the Adelaide could acquit themselves of the charge of negligence in relation to the look-out, their conduct, after they discovered the Laurel, would render their vessel responsible for the damage; for, it is obvious, upon their own testimony, that the collision could even then have been avoided by proper seamanship and ordinary precaution. When they saw the Laurel, it seems, they supposed her to be under weigh on the opposite tack, and from the manner in which she was heading, supposed they would pass each other safely, by putting the helm of the schooner hard up, so as to make her fall off from the wind, and say, they would have cleared her, if the Adelaide had not been struck by a flaw of wind which checked her in falling off. Now, they knew from the experience of the night, that the wind was squally; they knew that she had her mainsail, foresail and jib, all set and drawn nearly flat, as they were sailing close upon the wind; they knew also, that the pressure of the wind upon the mainsail had a constant tendency to prevent

her falling off, and to make her luff, when a flaw of wind struck her, and with all this knowledge, they relied altogether upon the rudder to make her fall off, and took no measures to assist or hasten it, by removing the counteracting influence of the mainsail. If that sail had been lowered, or the main sheets let go, the wind would have pressed altogether on the head sails, the schooner would have fallen off much more readily, and the flaw of wind which struck her would have aided her motion in that direction instead of retarding it. This precaution was rendered still more necessary and obvious, because she had lost her most important head sail, her flying-jib; and did not, therefore, so readily obey the rudder when the helm was put hard up. And when the vessels were so near, and the danger of collision so imminent, it was the duty of the schooner to have brought the sails to the aid of the rudder, and to have removed the strong counteracting influence of the mainsail drawn, as it was, nearly flat.

The neglect of these means can only be accounted for, by the mistake they made in supposing the Laurel to be under weigh and heading to the windward of the Adelaide upon the opposite tack; they seem, therefore, to have been under the impression, that a very slight falling off by the schooner would clear them of each other. It is difficult to imagine how practised seamen, like the master and mate, could have committed this mistake, when they were within fifty yards of the vessel, with her sails all furled, and on a starlight night; such a mistake can hardly be an excuse for running into her, when it might have been avoided by proper exertions, although she was at anchor. The mate says he was considerably excited, when he first saw the Laurel so near and directly before him; this was natural enough; but it ought not to have deprived him of his calmness and self-possession, nor prevented him from observing the true position of the vessel, and doing everything that seamanship could accomplish to prevent running into her. And if

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there had been no previous negligence in the look-out, the omission after she was seen, to use the means in their power to avoid the collision, would, of itself, make the Adelaide responsible. Upon each of these grounds, therefore, I think the decree of the district court is erroneous, and the libellants entitled to recover the full amount of the damages sustained by the Laurel.

*Brown and Brune*, for appellants.

*Wallis and Thomas*, for appellees.

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ROBERT TURNER

vs.

SILAS BEACHAM.

If a contract be the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute be, to whom the credit was given, and who is liable for the amount, it will be a case for admiralty jurisdiction; and the admiralty court may determine whether the owner of the ship, or certain anticipated and contingent partners, are liable for such repairs and supplies.

But where there was inseparably connected with a maritime contract of this sort, and forming part of it, an agreement, by the contractor for the repairs and supplies, to become a partner in a company to be formed to purchase the vessel: *Held*, that a contract to form a partnership to purchase a vessel is not a maritime one; a court of admiralty has no right to decide whether such a contract is legally or equitably binding, nor to adjust the accounts and liabilities of the different partners.

It is a clear rule of admiralty jurisdiction, that, although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one with justice to both parties, without disposing of the other, he must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy.

The admiralty court cannot adjust the rights and liabilities of the parties

## Turner v. Beacham.

upon one portion of such a contract and leave the other to be litigated in another court.

If the same question, between the same parties, upon the same subject-matter, be pending in a state court, of competent jurisdiction to decide upon all the rights in controversy, the admiralty court will refuse to entertain a suit upon any portion of the matters so in litigation in the state court.

Circuit Court, April Term, 1858. Appeal from the District Court, in Admiralty.

This was an appeal from the court of admiralty, on a proceeding *in personam*, instituted on the 21st of May 1857, by Silas Beacham, the appellee. The district court passed a decree in favor of the libellant, and an appeal was taken to this court, where the following opinion, in which the facts are sufficiently detailed, was delivered by—

TANEY, C. J. This is a libel *in personam*, for work done and materials and equipments furnished by Beacham, for the steamboat *Susquehanna*, of which the libel alleges that Turner was the owner at the time. Turner, in his answer, denies the jurisdiction of the court, and sets up a partnership ownership of the steamboat, by a company, in which he, and the libellant and sundry other persons, were partners; and for which company, he avers, the work was done; and avers that the partnership account is unsettled, and a suit is now depending in a court of equity in order to adjust it. Many witnesses have been examined on both sides; and the case, as presented by the record, is exceedingly complicated. The whole transaction appears to have been conducted in such a loose and irregular manner, that it is difficult for a court to determine what the parties intended by their contracts and proceedings.

It is not necessary, however, in the view this court takes of the subject, to go into a detailed examination of these complicated and loose proceedings; a brief summary will show the character of the case as it comes before this court.

## Turner v. Beacham.

Turner, the appellant, it appears, after a consultation with one or two other persons, determined to buy this steamboat, which was then lying at Havre de Grace, and to have her fitted up as an ice-boat, to be used in keeping open the navigation of the harbor of Baltimore during the winter. The plan was, that the boat should be brought to Baltimore and fitted up for the purpose for which she was intended; and should become the property of a company who should apply for a charter from the state. The price at which it was originally proposed that she should become the property of the company was \$25,000; and afterwards, it appears to have been reduced to the original cost of the boat, and the expenses incurred in putting her in complete order, which it is said would amount altogether to fifteen or sixteen thousand dollars.

In pursuance of the plan formed by Turner and others, as before mentioned, he sent an agent to Havre de Grace, who purchased the boat for him for \$4000, and she was brought to Baltimore and registered as belonging to Turner, he taking the usual oath that he was the sole owner. The same agent was employed by Turner to employ workmen and mechanics to put her in order, for the purposes for which she was intended, and at the same time to solicit subscriptions for shares, in order to form the company contemplated; the mechanics who were employed to do the work were all apprised of the plan, and were required to take a certain amount of stock in the company, as a condition upon which alone they would be employed. The libellant engaged to do the blacksmith's work, and in consideration of being so employed, he agreed to take stock to the amount of \$200; and his subscription was accordingly entered for that amount, by the direction of the person whom he had authorized to enter it.

It does not appear that the amount required was subscribed; but those who had subscribed met, and appointed a committee to take charge of the boat, and to obtain the contract with the city authorities for keeping open the

harbor; the appellant and appellee were both present at the meeting. The boat performed two or three trips under the direction of the committee; but they failed to obtain the contract with the city, and therefore, the whole enterprise was soon after abandoned, and the boat remained unemployed. It was then found, that her value was very far below what she had cost, including the very expensive repairs which had been put upon her after she was purchased by Turner; and Turner states in his answer, that he has since filed a bill in the circuit court for the city of Baltimore, charging that she belonged to the persons who subscribed for shares, and praying for a sale of the vessel, and a settlement of the partnership accounts; that she has been sold accordingly, a receiver appointed, and that the proceedings are still pending there to adjust the partnership accounts.

In this state of things this libel was filed; and the libellant claims to recover the whole amount of his bill from the appellant, without deducting anything on account of his subscription of \$200 for shares in the company. And several questions have been raised on the pleadings and evidence which it is proper to state, in order to determine whether the case before me is within the jurisdiction of a court of admiralty.

1. The libellant contends that the work and materials furnished by him, were furnished on the credit of Turner, who was the owner of the boat, and not on the credit of an embryo company, not then brought into existence, and which might never come into existence.

2. That he is not bound to deduct from his claim against the appellant, the two hundred dollars which he agreed to take in the stock of the proposed company, because the sum to be subscribed to purchase the boat, was never subscribed.

3. That if it had been subscribed, the libellant was not bound by his subscription, because it had been obtained by the misrepresentation of Turner as to the capacity and



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fitness of the boat for the purpose for which the company intended to use her; and also, because by the terms of his contract, he was to have had the whole of the blacksmith's work, and a part of this work was given to another person.

1. On the part of Turner it is contended, that the contract was made and the work done upon the credit of the contemplated company, to which, and not to him personally, the libellant and the other mechanics who worked upon the vessel were to look for payment.

2. That the company was brought into existence, and the libellant was a partner in it, and as such took a share in its proceedings.

3. That the accounts between him and the other partners, and with the libellant, as one of the partners, are unsettled.

4. That the partnership assets are now in the custody of a court of the state, and proceedings pending there to adjust the partnership accounts; and were so pending before and when this libel was filed.

These are the questions which have arisen in the case, and present the inquiry into the jurisdiction of the court of admiralty.

If the contract of the appellee had been the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute was to whom the credit was given, and who was liable for the amount, it is very clear that it would be a case for admiralty jurisdiction; and the court would, undoubtedly, be authorized to determine, whether Turner or the anticipated and contingent partners would be liable to the libellant for the money; and this question, upon the testimony, could be easily disposed of. But inseparably connected with this maritime contract, and forming a part of it, is the agreement to become a partner in a company to be formed to purchase the vessel. Now, a contract to form a partnership to purchase a vessel, or to purchase anything else, is certainly not maritime; a court of admiralty has no right to decide whether such a contract was legally or equitably binding, nor to adjust the accounts and liabilities

of the different partners. These questions are altogether outside of the jurisdiction of the court; and yet the amount actually due to the libellant, by whomsoever it is to be paid, cannot be decided, until these questions are first examined and determined. And I consider it to be a clear rule of admiralty jurisdiction, that although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one, with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. The case of *Grant v. Poillon* was decided upon this ground, at the last term of the supreme court. (20 How. 162.)

If the contract for repairs, and for the partnership, had been separate contracts, there would be no doubt of the jurisdiction; and so also, if the partnership had related to some collateral matter. But according to the testimony, the agreement to repair the boat and to become part-owner of her with the libellant and others, were but parts of one and the same contract, and in relation to one and the same thing, that is, the boat to be repaired; and this court cannot adjust the rights and liabilities of the parties upon one portion of the contract, and leave the other to be litigated in another court. If it has not jurisdiction over the whole contract, it could not, without great injustice, dispose of a part and compel the party to pay money on one portion of it, and leave it to another court to decide whether he had not claims against the libellant upon the partnership branch of it, which ought to have been adjusted before the account for work on the vessel was paid. Upon these grounds, the court is of opinion, that the decree of the district court must be reversed, and the case remanded, with directions to dismiss the libel for want of jurisdiction in the district court.

I have said nothing of the proceedings in the state court

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of equity, to which the appellant refers in his answer. They have not been filed in the case, and this court cannot, therefore, regard them as open to consideration here. Certainly, if the same question, between the same parties, upon the same subject-matter, were pending in a state court, of competent jurisdiction to decide upon all the rights in controversy, this court would refuse to entertain a suit upon any portion of the matters so in litigation in the state court.

*J. Carson*, for libellant.

*B. C. Barroll*, for respondent.

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ISAAC C. HALL, JAMES H. MYRICK and OTHERS,

vs.

SAMUEL HURLBUT.

On the 21st of September 1854, the libellants, who were residents of Boston, chartered their vessel, then in the port of New York, to the respondent, for a voyage from the port of Franklin, in Louisiana, to Baltimore; the respondent to load her with sugar and molasses, as specified in the charter-party, and upon the freight therein mentioned; the charter to commence when the vessel was ready to receive cargo at the place of loading, and notice thereof given to the charterer or his agent. The charter-party contained a provision that the vessel was to have the privilege of proceeding to a southern port, and load a cargo of lumber for the West Indies, and on the discharge of the cargo, to proceed direct to Franklin; under this provision, the owners, on the 23d of September, while the vessel was still at New York, chartered her to another person, for a voyage from Wilmington, in North Carolina, to Basseterre, in the Island of Guadeloupe, with a load of lumber. She sailed from New York on the 4th of October, arrived at Wilmington on the 8th of October, and sailed thence on the 2d of November, with a cargo of lumber for Basseterre; on the 5th of November, she was overtaken by a storm, and compelled to put into Nassau for repairs, and was detained there till the 4th of February 1855; on that day, she sailed for Basseterre, and after discharging her cargo, sailed thence for Franklin, and arrived at Pattersonville, a few miles below Franklin, on the 13th of April 1855. As soon as she arrived, the master

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called on the consignee, who was the agent of the respondent, and asked for his cargo; the agent told him he had no cargo, but would see if he could get one, and the master then commenced getting ready to take the cargo on board; in a few days, he notified the agent that the ship was ready to receive cargo, to which he replied, that he did not think the charter-party binding, and that he had no cargo for him; after receiving this answer, the vessel remained six or seven days at Pattersonville, and then sailed for Baltimore. By the terms of the charter-party the respondent was entitled to twenty running days to load the vessel, but she did not remain at Pattersonville more than half that time, and sailed for Baltimore in consequence of the answer received from the consignee: but for the delay at Nassau, the vessel would have arrived at Franklin during the usual season for shipping sugar and molasses from that region, which commences in November, and was proved by some witnesses to end by the 1st of March, and by others to continue during that month; and with regard to the delay at Nassau, the persons who surveyed the vessel when she arrived there, and those who repaired her, and assisted in landing her cargo, and in reshipping it, and fitting her to sail again, were examined, and testified that there was no unnecessary delay.

On libel filed in the admiralty by the owners of the vessel, against the charterer, to recover damages for the refusal to furnish the vessel with cargo: *Held*, that although there was no stipulation as to the time of sailing from New York, or as to the time to be consumed in the intermediate voyage, the law implied a covenant on the part of the ship-owners, that she would proceed to the port of destination with convenient speed, and use reasonable and proper exertions to reach it as early as practicable.

If the vessel wasted more time than was necessary in the intermediate voyage, or at any of the ports she entered, whether in repairing, or receiving or delivering cargo, the owners have no right to complain of a failure on the part of the shipper to furnish her with a cargo, if his inability to do so were caused by such unnecessary waste of time.

The circumstances above stated indicate no want of proper diligence on the part of the owners, or the master.

In the absence of any fault on their part, the unusual delay of the vessel, and her arrival at the port where she was to take in cargo, after the season for shipping it had gone by, did not release the charterer from the obligation to furnish the cargo stipulated for by the charter-party.

In considering the question of delay for repairs at Nassau, no comparison ought to be made between the time occupied at Nassau, and the time that would be occupied in similar work in Baltimore, because the time required must depend upon the facilities which the port affords for landing and reshipping cargo and repairing damages.

Where the charter-party contains no stipulation that the vessel shall arrive at the port of shipment by a particular day, the shipper takes the risk of delay or detention by any superior force which the vessel could not resist or overcome.

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The omission of the vessel to remain at Franklin the number of lay-days mentioned in the charter-party, after the master had been informed that a cargo would not be furnished, and the binding effect of the contract was denied, is no bar to the libellant's claim.

The fact that in making charter-parties for the sugar and molasses trade, it is the usage to make them with reference to the season, cannot affect the legal construction of the written contract.

In a case like the present, at common law, the plaintiffs would be entitled to recover the full amount of freight that would have been earned if the cargo agreed on had been furnished.

But in an admiralty proceeding, where the equity as well as the law of the case is before the court, the omission to give notice of the disaster which detained the vessel so long beyond her time, must exercise a serious influence in estimating the damages which the libellants are justly and equitably entitled to, and throw upon them a portion of the loss occasioned by such omission.

The master of the vessel was incompetent to testify to there having been no unnecessary delay in the voyage; because by contract with the owners he was to have half the gross profits of the voyage, and man and victual the ship, and pay half the port-charges, and therefore was interested in the result of the suit.

His becoming disabled, and employing another master to complete the voyage, did not render him competent, as it did not release him from the obligation to man and victual the vessel for the residue of the voyage; the person employed by him to act as master being merely his substitute and agent, for whose wages he would be responsible; and he, and not his substitute, being entitled to one-half the gross profits.

Circuit Court, April Term, 1858. Appeal from the District Court, in Admiralty.

TANEY, C. J. This is a case of some difficulty, arising from circumstances which obviously were not contemplated on either side, when the charter-party was executed. These unforeseen circumstances have disappointed the expectations of both parties, and the question is, who must bear the loss?

The charter-party was executed at New York, on the 21st of September 1854; the owners live in Boston, to which port the vessel belongs; and the charterer resides in Baltimore; the vessel was then lying in the port of New York. The owners, by their duly authorized agent, agreed to charter and freight the brig *Monte Christo* to the respondent,

for a voyage from the port of Franklin, in Louisiana, to Baltimore; the respondent to load her with sugar and molasses, as specified in the charter-party, and upon the freight therein mentioned; the charter to commence when the vessel was ready to receive cargo at her place of loading, and notice thereof given to the charterer or his agent. There is a further provision in the instrument, that the vessel was to have the privilege of proceeding to a southern port, and load a cargo of lumber for the West Indies, and on the discharge of the cargo, to proceed direct to Franklin. Under this last-mentioned stipulation, the owners, on the 23d of September, while the vessel was still in New York, chartered her to another person, for a voyage from Wilmington, in North Carolina, to Basseterre, in the Island of Guadeloupe, with a load of lumber.

The brig proceeded on this last-mentioned voyage, and after taking on board a cargo of lumber, sailed for Basseterre, on the 2d of November; on the 5th of November she encountered a storm, and suffered so much that it became necessary to put into Nassau to repair the damage. Upon her arrival at Nassau, the brig, upon survey, was found to be so much injured from the storm, that it was necessary to land her cargo, in order to make the repairs required to fit her for the sea; this was accordingly done, and the proper repairs made, and the cargo again placed on board; but she did not leave Nassau for Basseterre, until the 5th of February 1855. She then proceeded on her voyage without further accident, and after discharging the lumber at her port of destination, she sailed directly for Franklin, and arrived at Pattersonville, a few miles below Franklin, on the 13th of April 1855; she was prevented from going up to Franklin by the shallowness of the water. Woods, the master, who made the charter-party, became sick at Nassau, and was unable to proceed further, and Robert Dorritie, a competent ship-master for the voyage, was employed by Wood to take his place, with the approbation of the American consul. As soon as the brig arrived at Pat-

tersonville, Dorritie called on Edwin Walters, to whom the brig was consigned, and who was the agent of Hurlbut, the respondent, presented his charter-party, and asked for his cargo; Walters answered, that he had no cargo, but would try and see what cargo he could get, to give him to Baltimore; Dorritie thereupon landed his ballast, to be ready to receive cargo. Some two or three days afterwards, Walters went to New Orleans, and returned in five or six days; and upon his return, Dorritie informed him his vessel was then ready to take the cargo on board; to which Walters replied, that he did not think the charter-party binding, and he had no cargo for him. After receiving this answer, Dorritie remained six or seven days at Pattersonville, and then sailed for Baltimore, where he arrived about the latter end of April or beginning of May 1855.

By the terms of the charter-party, the respondent was entitled to twenty running days to load the vessel, and it is admitted, she did not remain at Pattersonville, ready to receive cargo, more than about half that time, and sailed for Baltimore in consequence of the answer received from the consignee. Before he sailed, Dorritie made a formal written demand upon the agent for the cargo, and upon receiving the answer above mentioned, made his protest, which substantially agrees with his testimony as given under the commission. Indeed, the agent for the respondent, in his testimony, agrees in all material respects with the testimony of the master as to what passed between them.

It will be seen by this statement, that nearly seven months elapsed after the charter-party was signed, before the brig arrived at Franklin, where the cargo was to be furnished and the charter to commence. I speak of her arrival at Franklin, because I regard her stoppage at Pattersonville as substantially the same thing; she was stopped, in the first instance, by the want of water in the river, and after the master's interview with Walters, he was absolved from the necessity of going there, as there was no cargo to be shipped.

It appears by the proofs in the case, that the voyages mentioned in the two charter-parties, which occupied nearly seven months, ought to be performed in about two, where proper preparations and efforts are made, and no accident interrupts them. And the first inquiry is, whether this unusual delay was occasioned by the negligence or the want of proper exertions on the part of the vessel; for although there is no particular stipulation as to the time the brig should sail from New York, or as to the time she might consume in the intermediate voyage, the law implies a covenant on the part of the ship-owner, that he will proceed to the port of destination, with convenient speed, and use reasonable and proper exertions to reach it as early as practicable. And if the *Monte Christo* wasted more time than was necessary, in the intermediate voyage, or at any of the ports she entered, whether she was repairing, or receiving or delivering cargo, the libellants are not entitled to recover; for they have no right to complain, if the inability of the merchant to furnish a cargo was occasioned by the non-performance on their part of the condition precedent.

In determining whether reasonable and proper exertions were made by the ship, it is proper to say, that I put aside the testimony of Captain Wood, as he is clearly interested in the issue of this suit; he states, that by his contract with the owners, he was to have half the gross profits, and to man and victual the ship, and pay half the port-charges. He says he expects nothing; that may be very true, for it is probable that the expenses of manning and victualling the ship, and employing the master, will consume more than one-half the gross profits, even if the libellants succeed to the full amount of their claim. But his inability to hold the command and proceed on the voyage, certainly did not, by operation of law, dissolve the contract or release him from the obligation to man and victual the vessel for the residue of the voyage; and it is evident, that there was no agreement between him and the owners to dissolve it. On the contrary, he (as it was his duty to do, under the circum-



stances) employed Dorritie, and agreed with him as to his wages, and Dorritie was nothing more than his substitute and his agent, and for whose wages Wood was responsible; and Wood, and not Dorritie, was entitled to one-half the gross amount of the freight. His contract with the ship-owners was in full force, and he has a direct interest in the issue of this suit, and is incompetent as a witness.

But putting aside his testimony, I think that the libellants have shown that reasonable and proper exertions were made by the brig, and that it does not appear that the delay was occasioned by any neglect of duty on her part, but by circumstances beyond the control of the master and crew.

It is true, that although the charter-party was executed on the 21st of September, she did not leave the port of New York until the 4th of October. But there is no covenant by the ship-owners that she should sail with convenient speed on the voyage contemplated, nor even a covenant that she is ready for sea; it is merely stated, that she was lying in the port of New York at the time, and that the owners had the privilege of entering into another charter-party for an intermediate voyage. She required time to make this second agreement; and after it was made, naturally required time to prepare and equip the vessel for these two voyages; the period between the 21st of September and the 4th of October, in the absence of any proof to the contrary, can hardly be regarded as proof of negligence or waste of time.

She arrived at Wilmington on the 8th of October, where she took in the lumber and sailed for Basseterre on the 2d of November; on the 5th, she was overtaken by a storm, and compelled to put into Nassau to repair and refit, where she arrived on the 12th, and did not leave that port for Basseterre until the 4th of February 1855, as I have already stated. Up to the time of her arrival at Nassau, the log-book contains a history of her proceedings; and the court see nothing in them of which the respondent has a right to complain. The stay in Wilmington, in receiving and taking

in the cargo, does not appear to have been prolonged by the fault or negligence of the master of the vessel; nor indeed, does the charter-party with the respondent require the vessel to use any extraordinary exertions to shorten the time to be occupied in the intermediate voyage. She sailed for Basseterre, from Wilmington, on the 2d of November, and if no casualty had happened, she had abundant time to reach Franklin, long before the usual season for shipping sugars and molasses was over. The delay at Nassau, however, was a very prolonged one, and it is incumbent on the libellants to show that it was not occasioned by the default of the master, and that he used every effort in his power to have the brig speedily repaired.

I think the testimony of the libellants establishes this fact. The persons who surveyed her when she arrived, and those who repaired her, and assisted in landing her cargo, and in reshipping it, and fitting her to sail again, have been examined, and they all testify that there was no unnecessary delay; they are witnesses who testify to what they saw, and in relation to matters in which they were personally engaged; and there is nothing in the record to contradict them, or to impair their credit. It is true, when we compare the time occupied at Nassau with the time that would be occupied in similar work in Baltimore, it would appear to have been unreasonably long; but such a comparison ought not to influence the judgment of the court, because the time required must depend upon the facilities which the port affords for landing and reshipping cargo, and repairing damages; and what may be done in a few days in one port, may require a month in another. Besides, the master of the *Monte Christo* had the strongest inducements of interest to urge on the work as speedily as possible; he was bound to victual and man the ship at his own expense, and every day's delay brought with it a heavy charge upon him personally, for which the owners were not bound to repay him. With such strong inducements on his

part to press on the work, and with the testimony of the witnesses above mentioned, I think the libellants have sufficiently established the fact, that the long delay at Nassau was unavoidable, and occasioned by circumstances beyond their control. As to the time occupied in the voyage to Basse-terre, and thence to Franklin, no objection has been taken, and the proof by the libellants is abundantly sufficient.

Tracking the brig, therefore, from the date of the charter-party to her arrival at Franklin, the court think that there was no unnecessary delay on the part of the vessel; and that reasonable and proper exertions were made to arrive at the port of shipment, within the time ordinarily occupied in the voyages described in the two charter-parties.

This being the case, and looking only to the language of the written charter-party, the unavoidable delay did not forfeit the right of the ship-owners to demand cargo upon the arrival of the brig at the port of shipment. The written contract contains no stipulation on their part that the vessel shall arrive at or before a particular day; the law implies no other condition than that reasonable and proper exertions shall be made, to perform the voyages contemplated by the charter-party, as speedily as practicable; and the shipper takes the risk of delay or detention, by any superior force which the vessel could not resist or overcome; whether it be an embargo by the government, or a storm on the ocean. The case of *Hadley v. Clarke*, 8 T. R. 259, and the cases of *Schilizzi v. Derry*, 4 Ellis & Bl. 873, and *Hurst v. Osborn*, 18 C. B. 144, were decided upon this principle; and the last-mentioned case, in all its facts and circumstances, strikingly resembles the one before the court.

Neither is the omission of the brig to remain at Franklin the number of lay-days mentioned in the charter, a bar to this claim. She was there, prepared to receive cargo, gave notice of it to the agent of the respondent, and remained there until she received the answer hereinbefore mentioned; the lay-days are expressly introduced into the

charter-party, to give the shipper convenient time to furnish the cargo; and when the master was informed that a cargo would not be furnished, and that the binding obligation of the contract was denied, any further delay at that port would have been a useless and improper waste of time, and of no service to any one. The principle which is so familiar in cases of insurance, applies with equal force to this; in case of a loss, the party insured is usually bound by his contract to produce his preliminary proof of loss, and the insurer is entitled to a certain number of days, after this proof, in which he is to pay the money. But if the insurer informs the assured that he denies his right to recover for the loss, and that he will not pay the money, the assured may sue at once, without preliminary proof, and without waiting for the expiration of the time allowed to the insurer for paying; his refusal dispenses with the performance of the condition. And upon the same principle, the positive refusal to furnish cargo, dispenses with the obligation of waiting to receive it.

The case of *Avery v. Bowden*, 6 Ellis & Bl. 953, has been referred to as deciding a contrary principle. But that case was decided upon a very strict and narrow construction of the words used by the party; the court held that these did not amount to an absolute and positive refusal; and this is perhaps a sufficient answer to this case; yet, it is proper for me to say, that I should have put a different construction upon them, and held that they dispensed the ship-owners from any further delay, and should not follow that decision, if the words were the same in the case before me.

Upon the written contract, then, speaking for itself, I think the libellants are not entitled to recover. But evidence has been offered of an established and proven usage in this trade, which it is supposed ought to influence the construction of the charter-party; but the court see nothing in the usage proved by the testimony, which can be regarded as material in this case. Some of the witnesses say, that the known and usual season for shipping sugar and molasses from

the Attakapas, in which Franklin is situated, begins in November, and ends with March; and that charter-parties for that trade are always understood to be made with reference to that season, unless otherwise specially provided; other witnesses limit the duration of the season to the first of March. But it is not easy to see how the usage of making the charter-party with reference to the season, can affect its construction. No doubt, when sugar and molasses are to be imported from Attakapas, and the charter-parties are made in other cities, they are made at a period of time when, according to the ordinary course of the voyage, the vessel will arrive at the season when these articles are usually exported from that country; this present charter-party was evidently made with reference to that season; and both parties expected at the time, that the vessel would arrive before the usual time for exportation was over. But how does that affect the construction of the written contract? None of the witnesses say that, by the usage, the ship-owner forfeits his right to the freight contracted for, if, by events beyond his control, the voyage has been protracted beyond the time contemplated by the parties; none of the witnesses say that, upon a contract of this kind, the ship-owner, by the usage, takes upon himself the risk of delay from unavoidable casualties; nor that the usage implies a stipulation on his part to arrive within the usual season for shipping; and that the performance of this stipulation is a condition precedent to his right to demand the cargo and freight which the shipper contracts to furnish. Indeed, if even a usage to that extent had been proved by these witnesses, it could hardly be allowed to engraft a new stipulation into the contract, inconsistent with the legal construction of the written instrument. But certainly, as far as the usage is proved, none of the witnesses say that it would, in any degree, influence the construction of a charter-party like the one before the court, or affect the rights of the parties under it.

It follows from what I have said, that the refusal of the respondent to furnish a cargo, was a breach of his covenant,

for which the libellants are entitled to recover damages; and the remaining question is, by what rule are these damages to be measured? If it were a suit at common law, where legal rights and legal obligations are alone the subjects of consideration, and equitable claims cannot be brought into the view of the court, the result, undoubtedly, would be, that the libellants must recover the full amount of the freight that would have been earned, if the cargo agreed on had been furnished. This was the case in the suits on the charter-parties above referred to, in the English courts; they were all suits at common law, and no equitable circumstances could, therefore, be introduced in mitigation of damages.

But this is a proceeding in admiralty, and the equity, as well as the law of the case, is before the court; and I think the omission to give notice of the disaster which detained the vessel so long at Nassau, must exercise a serious influence in estimating the damages to which the libellants are justly and equitably entitled. The proof shows that the master had frequent opportunities to give this notice. It is true, that there is no stipulation in the charter-party that the ship-owner shall give notice to the shipper of any interruption or delay in the voyage, which may be occasioned by storm or otherwise; every voyage is liable to more or less delay, from contrary winds or the dangers of the sea; and the possibilities of delays, and occasional interruptions for a few days, or even a week or two, must always be in the contemplation of the parties when a charter-party is made, and no notice of any such delay is required, unless expressly provided for by the instrument itself. But the delay in this case was entirely outside of the ordinary events of such a voyage, and is probably without example in the history of the trade. It obviously could not have been in the contemplation of either of the parties to the contract; and it was an event, therefore, for which the charter-party did not intend to provide.

Now, the master of the Monte Christo knew that the shipper would expect him to arrive in the ordinary period of such voyage; that his cargo would be prepared accordingly; that a long delay in keeping it on hand, and daily expecting this brig, might expose him to inconvenience and loss; and that he might conclude, after such a lapse of time, without hearing from her, that she was lost, or had wilfully broken the contract; and would probably, under this impression, ship all the sugar and molasses under his control, and have no cargo to ship when the brig unexpectedly arrived. With this knowledge, and knowing that such a long delay was not contemplated by either party, and on that account not provided for in the contract, good faith and justice required that he should, as soon as practicable, apprise the shipper of the event which had so unexpectedly happened, and of the probable time of his detention at Nassau. He could not, without great injustice to the shipper, withhold from him the knowledge that his voyage would be delayed nearly three months beyond the time contemplated, and leave to the shipper to conjecture the cause of this delay, and embarrass him in his shipments during all that time. The inability of the shipper to provide a cargo, was evidently occasioned by this want of notice, and the ship-owners must share in the loss occasioned by their omission to perform a duty, which justice and fair dealing evidently required. On the other hand, it is equally true, that the shipper ought not to have disabled himself from fulfilling his contract, without having first sought information as to the condition of the vessel, and the cause of the unexpected delay.

I am not, however, prepared at this time to say, what amount of freight would have been earned, if the cargo had been supplied; nor the precise proportion of the loss which the libellants should bear. I shall, therefore, refer the papers in the case to a commissioner, with directions to state an account, and to receive any further evidence that either

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party may offer to enhance or diminish the damages. It will be remembered, however, that the testimony of Captain Wood is not in the case, he being an incompetent witness.

*S. T. Wallis* and *R. S. Matthews*, for appellants.

*David Stewart* and *John Stewart*, for appellees.

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BENJAMIN HANEY and OTHERS

*vs.*

THE STEAMER LOUISIANA and CLAIMANTS.

If a steamboat approach so near a sailing vessel, without any fault on her part, as to create a reasonable apprehension that a change in the course is necessary to save the vessel or the lives of the crew, and an error of the moment, committed by the helmsman or look-out, bring on the disaster he meant to avoid, such error will not be regarded as a fault; the steamboat alone is responsible, and must answer the loss.

The rule, that when two vessels are meeting in opposite directions, each one shall port her helm, so as to pass each other on the larboard side, applies only to cases where both are sailing vessels, or both are steamboats, not to cases where one is a steamboat and the other navigated only by sails.

In the latter case, it is the duty of the sailing vessel to keep steadily on her course, and the duty of the steamer to get out of her way, passing either on the starboard or larboard side, as may be most convenient to her.

A steamboat carrying the mail is bound by the same laws and rules of navigation that govern any other steamer which is engaged in the transportation of passengers or merchandise and without any mail; no contract with the post-office department, or any other department of the government, can dispense with any of the duties to which steamboats, navigating the same waters, are subject.

The strictest supervision should always be exercised by courts of justice over steam-vessels navigating our bays and rivers, and the utmost vigilance and caution constantly exacted from them, when approaching sailing vessels.

Circuit Court, November Term, 1858. Cross-appeals from the District Court, in Admiralty.



*Haney v. The Louisiana.*

This case came before the circuit court on cross-appeals from the decree of the district court, in favor of the libellants.

The facts are fully stated in the opinion of the court, delivered by—

TANEY, C. J. This is a libel by the owners of the schooner William K. Perin, of Fair Town, New Jersey, against the steamboat Louisiana, for running into and sinking her in the Chesapeake Bay, about five miles below the Rappahannock lightboat. The collision took place between nine and ten o'clock of the night of the 26th of February 1858.

The schooner was engaged in the oyster trade; she was sixty feet long, eighteen feet beam, and registered at thirty-two tons; she was loaded with oysters, which she had obtained in the Patuxent river, and sailed from Drum Point harbor, at the mouth of the river, on the day above mentioned, down the bay, and bound for Philadelphia. The night was a bright moonlight one, on which vessels could be seen at a considerable distance. When the collision took place, the schooner was heading directly west, and she received the blow which sunk her, about ten or twenty feet from the stern (the witnesses give these different distances); the head of the Louisiana striking her at a right angle, on the larboard side. In determining whether either or both of these vessels were in fault, I proceed to examine, in the first place, the manner in which the schooner was navigated.

The light of the steamboat was seen from the schooner, three or four miles off; there was no one on deck, from the time the light was seen, until after the collision, but Miles, the helmsman, and Carey, the look-out. The wind was about north-northwest, blowing a stiff breeze, and the schooner standing south, and going at the rate of six or seven miles an hour.

The look-out, Carey, states that he has been following the water, as an oysterman, for four and a half years, and during

that time performing the duty of a mariner, when not dredging for oysters; that it was a part of his duty to help to navigate the vessel, to help to look out, and he was always in one of the watches; he had never been down the bay, below the Patuxent, until the night in question. He was walking on the leeward side of the vessel, when he saw the light of the Louisiana; he saw her, he says, between the night-head and fore shroud of the schooner, and of course, must have been walking abaft the foremast at the time. As soon as he saw the steamer, he called to the helmsman, and said, "had you not better keep away?" and receiving no answer, he again called to him, about five minutes afterwards, and repeated what he had before said, but still received no answer. At the time he first saw the Louisiana, he says, she was to the leeward, and larboard, and eastward of the schooner, and distant three or four miles down the bay.

The statement of this witness shows that he was altogether unfit for the duty assigned to him. He was no seaman; he was on the leeward side of the vessel, abaft the foremast, where his view of the approaching vessel was necessarily more or less interrupted and confused than it would have been, if he had walked or stood at the head or on the starboard side, where there was no object between him and the approaching steamboat. It was a cold night, and it would seem, that he was sheltering himself from the wind under the lee of the mainsail, instead of being at the appropriate place for a look-out. When he saw the light, he called to the helmsman to bear away; in other words, to stand more to the east, and received no answer; he contented himself with remaining where he was, and repeating the direction, without making the slightest effort to see the helmsman, or to ascertain why the direction had been disregarded; although a few steps would have brought him by his side. But the conclusive proof of his incompetency is, that at the time he gave these directions, he thought, he says, that the steamboat was to the eastward of the schooner; now, if the steamboat, coming up the bay, was to the leeward and east-

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ward of the vessel going down, his direction to bear away, if followed, would have placed the schooner directly in the path of the ascending boat, and rendered a collision almost inevitable. Yet he states, positively, that he twice gave the direction, although he saw the steamboat rapidly approaching on that side. The apparent inconsistency of his conduct can be accounted for only by remembering that he was an oysterman rather than a sailor, and having never before been on that part of the Chesapeake Bay, he did not know, precisely, the points of the compass, and supposed the steamboat to be to the east of south, when she was really on the west; but, however this may be, the evident inconsistency of his directions, with the position of the steamboat, as he says he believed it to be, is sufficient proof, that he was not a competent look-out, and that there was gross negligence on the part of the schooner, in confiding such an important duty to a person so little qualified to perform it.

The helmsman was hardly better. It is difficult to understand, if he was awake, and attending to his duty, how it happened that he did not hear the advice of the look-out, twice given, to bear away. The vessel was a small one, and the look-out must have been only a few yards from him; but it seems, he sought no information from the look-out, and paid no attention to him, but took upon himself the double duty of look-out and helmsman; and the position in which he placed himself, for that purpose, made it impossible that either could be performed with proper nautical skill. He was on one knee, from a half to three-quarters of an hour, watching the Louisiana, under the boom of the schooner, and at the same time attending to his helm; the boom was only three and a half feet from the deck, and the compass about two feet ten inches; so that while he was in that position, looking at the steamboat, his attention was unavoidably withdrawn from the compass, by which it was his duty to steer, and that, too, when the vessels were nearing each other, and when steadiness and precision in his course were of the first importance; and when it was also his first duty, in order

that the steamboat might see how she could avoid the schooner. It necessarily, also, for the time, diverted his attention from the helm, and with the stiff breeze blowing, and her sails on the larboard or eastern side, she would, upon any relaxation of his hold on the helm, luff, and her course be to the westward of south. Although he might correct this deviation, as soon as he again looked at the compass, yet he would inevitably fall into error, as to the relative position and course of the Louisiana, if, while he was looking at her, under the boom, he supposed his own vessel was standing due south, when, in fact, she might be a half point or point to the westward. His anxiety and apprehension would seem to have impaired his self-possession, as the steamboat neared him; he knew, he says, that it was his duty to keep his course steadily, and would not, therefore, have obeyed the directions of Carey, even if he had heard him. In this respect, he was undoubtedly right; and it was, therefore, his duty to keep his eye steadily upon his compass, without looking out for the approaching vessel, or conjecturing what course it meant to take, or on which side it intended to pass him. It was the duty of the steamboat to keep out of his way; but he watched the steamboat, until his alarm got the better of his judgment, and instead of continuing on his course, he put his helm down, and brought the head of his vessel directly west, crossing, at right angles, the line in which the Louisiana was steering.

It is evident, therefore, upon the testimony given by themselves, that the schooner, at the time of the collision, was in the charge of two men, incompetent and unfit to be trusted with her navigation, on a great thoroughfare of commerce, where she was continually meeting sailing vessels and steamboats, moving in the opposite direction; and her mistakes and mismanagement contributed to the disaster, if, indeed, they were not the sole cause of it.

It remains to inquire into the conduct of the steamboat; for, if the Louisiana was in any degree in fault, she must share in the loss. The schooner was seen from the steamer,

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when she was three or four miles off; it was the master's watch, in which, according to established usage, the running and course of the vessel are in charge of the second mate, who is always in the master's watch; Ward, the second mate of the Louisiana, was in charge that night, and was also the pilot; and the Perin was observed, at the distance above mentioned, by the second mate, and by Captain Russell, who was then on deck.

The mate states, that, at the time he first saw the schooner, the steamer was heading due north, and the schooner appeared to be heading a south course, and then bore about north one-half east, on the starboard side of the Louisiana. The steamboat was going at the rate of twelve or fourteen miles an hour; she continued at the same rate of speed, and upon the same course; and when the vessels had approached each other within three or four hundred yards, the schooner then bore north one point east from the steamer, on the starboard side, and when she got within about one hundred and fifty yards, the helm of the steamer was put to starboard, and the vessel headed a north-by-west course, which left the schooner bearing two points east, on the starboard bow of the Louisiana. At the moment he had steadied her in that course, he discovered that the schooner, which had been standing to the south before, had altered her course, and had put her helm down, and was heading across the bay, as near as he could judge, a west course; this led her directly across the head of the steamboat, and she kept that course until the collision. The moment the mate saw the change in the schooner's course, he gave the signals to stop and back, which were instantly obeyed; the motion of the steamboat could not, however, be stopped, within the distance then between the vessels, and the collision took place as hereinbefore described.

It has been said, there was not a sufficient look-out on board the steamboat, but I perceive no fault in that respect. Ward, the mate, who was the look-out at the time, is proved to be an experienced seaman, entirely trustworthy, and who

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had for years been employed in the navigation of steam-boats up and down the bay, and on the Louisiana for four years. He was stationed in the pilot-house, which is proved to be the best position, for a look-out, on the steamboat; he watched the approach of the schooner, from the time she was first seen, until the collision, and promptly gave his orders to the helmsman and the engineer, as occasion required; nor did his duty as pilot, or his attention to the compass, interfere with his duty as a look-out; for the vessel was in a wide, deep water, where his duty as pilot and as a look-out was the same, that is, to conduct the vessel safely past other vessels, which she might meet with in her way; and he had, by his side, a helmsman, skilled and trustworthy, with the compass before him, who promptly obeyed the orders of the mate—he was a colored man, and cannot, therefore, be examined as a witness. But the mate would see, from the heading of his vessel, without looking at the compass, or taking his eye from the approaching schooner, whether the order he gave was attended to, and he testifies that it was immediately obeyed. And in my judgment, it is evident, from the courses and position of the two vessels, from the time they came in sight of each other, that they would have passed each other in safety, if the schooner had continued, as it was her duty to have done, to hold her course due south.

So far as the witnesses on the two vessels differ, as to their relative position when first seen, and as they approached one another, the weight of the testimony is decidedly on the side of those on board the Louisiana; for there was a steersman and a look-out, each competent and experienced, and accustomed to navigate the bay for years before, each in his proper place, and each confining his attention exclusively to his appropriate duty; while the look-out on the schooner, when he formed his opinion of the relative bearing of the vessels, had no compass before him, was a stranger in the waters in which he was sailing, and could not be expected to form an accurate judgment of the points

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of the compass, of which he speaks; and what I have before said as to the position and conduct of the helmsman, shows that but little confidence can be placed in his opinion. Both of these witnesses say, that if the schooner had not changed her course, she would still have been struck by the steamer; but upon the whole testimony in the case, I think they are evidently mistaken. The schooner was going at the rate of six or seven miles an hour, when her helm was put down; she was not stationary while her course was changing to the west, and her speed continued nearly the same; and she must have gone at least twice or three times her own length to the west, before she received the blow. The speed of the schooner was about one-half of that of the steamboat, when both vessels were under full headway; and after the schooner changed her course, with all her sails still set, she must have gone at least that distance west, before the steamer, backed as she was, could have passed over the one hundred and fifty yards which separated them, when the *Perin* put down her helm, and changed her course; and if that was the case, it shows that if she had kept steadily on, due south, she would have passed, at the distance of forty or fifty yards, on the eastern or starboard side of the *Louisiana*. Indeed, after the schooner headed to the west, being still under full sail, her speed must have been nearly equal to that of the steamer, when checked and retarded by the efforts to back her; and if the vessels were meeting in a direct line, when the helm was put down, as the witnesses for the libellants suppose, she must have cleared the line of the steamer some distance, and been safe on the west side; but it appears that ten or twenty feet of the schooner was still on the east side of the steamer, when the vessels came in contact.

Moreover, from the relative bearing and course of the vessels, as described by the master and mate of the steamer, when they discovered each other at the distance of three or four miles, they would have passed still further from each other, if the *Perin* had steadily kept her course south, as the

steamer did her course north. But the unfavorable position in which the helmsman placed himself, and his anxious watching of the steamer for half or three-quarters of an hour, necessarily diverted his attention frequently from the compass, and from the strength of the wind; with the sails on the eastward side, there was a constant tendency to luff, and bring her head to the west of south, unless steadily restrained by the rudder, and in fact, without any obvious and palpable change in her general course, she was found nearer the steamboat than a due north and south line would have brought them, from their relative position, and bearing and distance, when they first came in sight of one another.

It has been urged on the part of the libellants, that this case falls within the rule laid down by the supreme court, in the case of the *Gennessee Chief*, 12 How. 443. And undoubtedly, if a steamboat approaches so near a sailing vessel, without any fault on her part, as to create a reasonable apprehension that a change in her course is necessary to save the vessel, or the lives of the crew, and an error of the moment, committed by the helmsman or look-out, brings on the disaster he meant to avoid, the error will not be regarded as a fault, and the steamboat alone is responsible and must answer for the loss. It is a rule founded in justice, and ought to be rigidly enforced by the courts, but it does not bear upon the present case; for the contiguity of the vessels, and the collision, appear to have been occasioned altogether by the incompetency and mismanagement of the look-out and steersman of the schooner.

Nor does the rule that when two vessels are meeting in opposite directions, each one shall port the helm, so as to pass each other on the larboard side. The rule applies only to cases where both are sailing vessels, or both are steamboats, not to cases where one is a steamboat and the other navigated only by sails; in the latter case, it is the duty of the sailing vessel to keep steadily on her course, and the duty of the steamer to get out of her way, passing on either the starboard or larboard side, as may be most convenient to



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the latter. The rule upon this subject was stated by the supreme court, in the case of *St. John v. Paine*, 10 How. 583, where the whole subject was fully considered, and carefully decided; and the rules and laws of navigation there stated, have always since been adhered to.

In disposing of this case, I have spoken only of the testimony of the mate, and of the two witnesses who were on board the schooner. It is proper, however, to add, that I consider Captain Russell a competent witness, he having been first released by the owners; and his testimony strongly confirms that of the mate. He saw and observed the course of the schooner when she was descried, and the course she was steering, and also the course of his own boat, and their relative bearings, and he had been in the cabin but a minute or thereabouts, after making these observations, when he heard the bell ring to stop the engine, and upon coming out, saw the schooner standing west, across his bows. He has been twenty-five years engaged in navigating steamboats on the Chesapeake Bay, and he proved that the look-out and helmsman were both experienced, and well qualified for their respective offices, were both in their proper places, attending to their respective duties.

I have said nothing of the testimony of the master of the *Keyser*, which sailed from the Patuxent in company with the *Perin*. It is obvious, that he was at too great a distance to see, by moonlight, the exact course of the steamboat or the *Perin*, when they neared each other, or what passed just before, or at the moment of collision; for, he did not arrive at the place of the disaster, although he immediately made sail for it, until the steamboat had proceeded up the bay, and was out of hail, with a six or seven-mile fair wind; it must, therefore, have taken him nearly half an hour to reach the wreck; his distance must, consequently, have been between two and three miles, although he supposes it was shorter. These estimated distances, on water, especially at night, are seldom entirely accurate, and not to be relied on, unless

made by a practised seaman or pilot, accustomed, necessarily, to measure the distance by his eyes.

Neither can the rate at which the steamboat was moving, be imputed to her as a fault. She was in a wide, open water, on a bright, moonlight night, in which a small sailing vessel could be seen at the distance of three or four miles, and if the sailing vessel did her duty by keeping steadily on her course, a steamer would have no difficulty in passing her at a safe distance, at the speed with which the Louisiana was then moving. But the circumstance stated in the answer, that she was carrying the mail, and bound by contract to perform the trip between Baltimore and Norfolk, within a certain time, has no influence on the decision of the court. A steamboat carrying the mail is bound by the same laws and rules of navigation that govern any other steamer, which is engaged in the transportation of passengers or merchandise, and without any mail; and no contract with the post-office department, or any other department of the government, can dispense, in any degree, with any of the duties to which other steamboats, navigating the same waters, are subject. The mail-carrier is bound to observe the same laws and regulations which govern steamboats engaged in the ordinary business of transporting passengers or merchandise. But, for the reasons before mentioned, I think the speed of the Louisiana was not an incautious or imprudent one at the time, and furnishes no ground for subjecting her to any portion of the damage.

I am sensible that the strictest supervision should always be exercised by courts of justice over steam-vessels navigating our bays and rivers, and the utmost vigilance and caution constantly exacted from them, when approaching sailing vessels; this has been the invariable rule and settled policy of the courts of the United States, in cases of collision. But it appears to me, upon a careful examination of the whole testimony, that the steamboat, in this instance, was in no respect culpable; and that the disaster was occasioned altogether by the incompetency and mismanagement of those

*Haney v. The Louisiana.*

who were in charge of the schooner ; and in this view of the case, the damage must fall altogether upon those who confided their property to incompetent or negligent hands. If the steamboat committed no fault, she is not justly liable for any share of the damage.

The decree of the district court must, therefore, be reversed, and the libel dismissed with costs to the respondents in this court, each party to pay his own costs in the district court.

*R. R. Buttee* and *Wm. M. Addison*, for libellants.

*Wm. Schley* and *Wm. K. Falls*, for respondents.

Reversed on appeal, 23 How. 287.



# APPENDIX.

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## CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1836.

### CHARGE TO THE GRAND JURY.

TANEY, CHIEF JUSTICE. It has been usual for this court, at the opening of the term, to deliver a charge to the grand jury; and you will probably expect one from me, in conformity with this practice. As I doubt much the necessity of continuing the custom, and may not hereafter adhere to it, my address to you will be a brief one, and its chief object to explain why I am disposed to depart from the former practice.

There was a time, without doubt, in the days that have gone by, when precise and detailed instructions from the court, to the grand jury, were necessary for the purposes of justice. But in the present enlightened state of the public mind, when education and useful information are not confined to a few, but diffused generally throughout the community, every citizen summoned as a juror, has a general knowledge of the duties he is called there to perform, and of the manner in which it is incumbent on him to discharge them; and in all cases demanding more precise and particular knowledge, you will have the aid of the district attorney, whose duty it is to counsel you in matters of law, whensoever you may think proper to require it. It cannot, therefore, be necessary, in a charge from the bench, to enumerate and define, with legal precision, the various

offences against the United States, which are punishable by indictment in this court. But few, I trust, if any, infractions of the law are likely to come before you, and it would be a waste of time in the court to engage itself in discussing principles, and enlarging upon topics which are not to lead us to some practical result; nor can any useful purpose be answered by calling upon you to follow the court through the wide field of criminal jurisprudence, when it is well known that your labors will be confined to a very small portion of it. It is my earnest desire, that we should proceed at once, with industry and energy, to execute the duties for which we are assembled, and while we give to every subject brought before us, the most ample time for full examination and elaborate judgment, not a moment should be wasted in unnecessary forms.

The court must, however, impress upon you the propriety of being diligent in your inquiries, and careful and elaborate in your conclusions. In a country like ours, blessed with free institutions, the safety of the community depends upon the vigilant and firm execution of the law; every one must be made to understand, and constantly to feel, that its supremacy will be steadily enforced by the constituted tribunals, and that liberty cannot exist under a feeble, relaxed or indolent administration of its power, where crime goes unpunished and the law is contemned. With a criminal code so mild and forbearing as ours, there can be no just cause for sympathy with any party who voluntarily, under any pretext, incurs its penalties; and negligence or carelessness in your inquiries would tend to multiply the number of offences, and would deprive society and the individual citizen of the protection and security to which they are entitled.

But in our desire to bring the guilty to punishment, we must still take care to guard the innocent from injury; and every one is deemed to be innocent, until the contrary appears by sufficient legal proof. You will, therefore, in every case that may come before you, carefully weigh the

testimony, and present no one, unless, in your deliberate judgment, the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused. And this rule is the more proper, because he is not permitted to summon witnesses or adduce testimony to the grand jury, and your decision must be made without hearing his defence.

Gentlemen, you may retire to your room.

## LORD BACON'S MAXIMS,

AND

SOME REMARKS THEREON BY THE CHIEF JUSTICE.

I HAVE often thought it would be well for some of the judges before whom I have practised law, to read Lord Bacon's speech to Justice Hutton, when he was called to be one of the judges of the common pleas, in which, after some general remarks upon the importance of the office conferred upon him, and advising him not to be *head-strong* but *heart-strong*, he proceeds to represent to him "the lines and portraitures of a good judge," in the following language:

"1. The first is, that you should draw your learning out of your books, not out of your brain.

"2. That you should mix well the freedom of your opinion with the reverence of the opinion of your fellows.

"3. That you should continue the studying of your books, and not to spend on upon the old stock.

"4. That you should fear no man's face, and yet not turn stoutness into bravery.

"5. That you should be truly impartial, and not so as men may see affection through fine carriage.

"6. That you should be a light to jurors to open their eyes, but not a guide to lead them by the noses.

"7. That you affect not the opinion of pregnancy and expedition, by an impatient and catching hearing of the counsellors at the bar.

"8. That your speech be with gravity, as one of the sages of the law, and not talkative, nor with impertinent flying out to show learning.



"9. That your hands and the hands of your hands, I mean those about you, be clean and uncorrupt from gifts, from meddling in titles, and from serving of turns, be they of great ones or small ones.

"10. That you contain the jurisdiction of the court within the ancient merestones, without removing the mark.

"11. That you carry such a hand over your ministers and clerks, as that they may rather be in awe of you than presume upon you."

Perhaps nothing could be added to this "portraiture" to make it more perfect, unless it be that the judge should be punctual to the minute to the times appointed for the meeting of the court, or for the transaction of other business; and should exact the same punctuality from all others. The speech of Lord Bacon will be found in the fourth volume of Bacon's works, page 507, London edition of 1803, in 10 volumes.

There is another part of Lord Bacon's works which some learned jurists might have consulted with advantage. In *Bonham's Case*, Lord Coke says, "It appeareth in our books that in many cases the common law shall control acts of parliament, and sometimes shall adjudge them to be utterly void; for, when an act of parliament is against common right and reason, or repugnant, or impolitic to be performed, the common law shall control this, and adjudge such act to be void."

Now there is something very flattering to judicial power in the notion, that it may restrain legislative power within such limits as the court may suppose are consistent with common right and reason; and this passage stated alone in the abridgments, without the passages which follow it in the reports, and a similar one imputed to Lord Holt, in the case of the City of London, have induced some of our judges to state the principle much more broadly than Lord Coke intended it; and much more broadly than can be maintained on any sound principles of judicial power.

It evidently means to state a rule for the construction of

statutes, and not to assert a power to annul them. It gives some principles by which you are to ascertain the meaning and intention of the legislature, but does not pretend that the courts have the power to defeat that intention when it is ascertained. I do not speak of laws made, in this country, contrary to the constitution of the state or of the United States; but I speak of the rule as Lord Coke meant to state it, with reference to England, and as it would apply in this country to a law admitted to be constitutional.

This point was one of the five which were thought so objectionable, that Lord Coke was called on, by a commission appointed by the king, at the head of which was Chancellor Ellesmere, to explain his meaning; it will appear from his answer that he meant nothing more than I have stated; and that the objection then made to it was founded on the same misconstruction which has been given to it in more modern times. Lord Coke's letter of explanation is in the sixth volume of Bacon's works 405; the interrogations to which it is in part an answer, are mentioned in 397. Lord Ellesmere's remarks on Coke's Reports, and in relation to this passage, are not, I believe, in Lord Bacon's works.

# I N D E X.

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## ADMIRALTY.

### DEBTOR AND CREDITOR, 1, 2.

1. The admiralty court has jurisdiction in cases of collision happening upon tide-water in the Chesapeake Bay, or the rivers emptying therein; the jurisdiction has been settled by the decision of this court, and has been acted upon on several occasions, and cannot now be considered as open for argument. *Taylor v. Harwood*, 437.

2. The contract created by the signing of a bill of lading, for the carriage of goods from one seaport to another, is a maritime one, and within the jurisdiction of the admiralty. *Harrison v. Stewart*, 485.

3. Where repairs are made upon a small vessel of twenty-seven or twenty-eight tons, engaged exclusively in transporting the products of the farms of the respondent, lying in Maryland, to the city of Baltimore, and a libel is filed against him to recover the value of those repairs, alleging that they were useful and necessary for the vessel, and for her safety and navigation on the high seas, and this allegation is not denied, nor is any testimony taken in reference to it: *Held*, that whether a vessel be one of that class which is fitted for the navigation of the sea or not, is a question of fact, not of law, and if disputed, must be tried by the testimony of witnesses. *Reppert v. Robinson*, 492.

4. If the respondent mean to rely upon the character of the vessel in this respect, he must put it in issue by his answer, otherwise, no evidence can be received upon the subject. *Ibid*.

5. The manner in which the vessel is actually employed cannot affect the question of jurisdiction; it depends upon her character; if the repairs fitted her for the navigation of the sea, the contract was maritime; and it does not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode or trade in which he afterwards employed her. *Ibid*.

6. The right to sue in the admiralty upon claims of this description, is personal, and is maintained upon principles and reasons which do not apply to an assignee. *Ibid*.

7. An assignment, after the suit was instituted, and after the court had taken jurisdiction of the case, would perhaps stand upon different grounds from an assignment made before. *Ibid*.

8. Rafts anchored in the stream, although it be a public navigable river, are not the subject-matter of admiralty jurisdiction, in cases where the right of property or possession is alone concerned; they are

## ADMIRALTY.

not vehicles intended for the navigation of the sea or arms of the sea; they are not recognised as instruments of commerce or navigation, by any act of congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port; and any assistance rendered to these rafts, even when in danger of being broken up, and swept down the river, is not a salvage service, in the sense in which that word is used in courts of admiralty. *Tome v. Four Cribbs of Lumber*, 583.

9. The remedy of the owners of the lumber in such case, to regain the possession, from the party claiming salvage, is an action of replevin, and not a libel in the district court. *Ibid.*

10. If a contract be the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute be, to whom the credit was given, and who is liable for the amount, it will be a case of admiralty jurisdiction; and the admiralty court may determine whether the owner of the ship, or certain anticipated and contingent partners, are liable for such repairs and supplies. *Turner v. Beacham*, 583.

11. But where there is inseparably connected with a maritime contract of this sort, and forming part of it, an agreement by the contractor for the repairs and supplies, to become a partner in a company to be formed to purchase the vessel: *Held*, that a contract to form a partnership to purchase a vessel is not a maritime one; a court of admiralty has no right to decide whether such a contract is legally or equitably binding, nor to adjust the accounts and liabilities of the different partners. *Ibid.*

12. It is a clear rule of admiralty jurisdiction, that, although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one, with justice to both parties, without disposing of the other, he must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. *Ibid.*

13. The admiralty court cannot adjust the rights and liabilities of the parties upon one portion of such a contract, and leave the other to be litigated in another court. *Ibid.*

14. If the same question, between the same parties, upon the same subject-matter, be pending in a state court, of competent jurisdiction to decide upon all the rights in controversy, the admiralty court will refuse to entertain a suit upon any portion of the matters so in litigation in the state court. *Ibid.*

## AFFREIGHTMENT.

ADMIRALTY, 2.

## AGENCY.

PRINCIPAL AND AGENT.

## AMENDMENT.

## EXECUTION, 1.

1. A libel was filed in the district court, by a seaman, against the master of a vessel, to recover a balance of \$30 95, claimed to be due for wages; and also damages for an assault committed upon the libellant by the master, without claiming any particular amount of damages: the libel was dismissed by the district court, and in the circuit court, to which the case was taken by appeal, a motion was made to dismiss the appeal, on the ground that the record did not show that the sum in controversy amounted to \$50: a motion was thereupon made by the appellant, to amend his libel, by inserting that he had sustained damages, by the assault, to the amount of \$300: one of the witnesses had proved that he would not have run the risk of the blow given to the libellant for \$100: *Held*, that the amendment asked for could not be made; that the circuit court had no authority to review the decree of the district court, unless the sum in controversy amounted to \$50; and that the court could not permit an amendment to be made, the object of which was to change the record so as to give the court jurisdiction, in a case where, according to the record before them, they had none. *Agnew v. Dorman*, 386.

2. If the case showed that the appeal was legally before the court, then, having jurisdiction over it, the court could permit the pleadings to be so amended as to enable it to do justice between the parties; but it cannot acquire jurisdiction, by altering the record which has come to it from the district court. *Ibid*.

3. The Court of Admiralty never suffers the substantial justice of the case to be defeated by matters of form. *Taylor v. Harwood*, 437.

4. If any persons have joined in a libel, who are not competent to sue for the matter complained of, the circuit court, although an appellate court, will give leave to amend, and to strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits. *Ibid*.

5. The circuit court, upon appeals from the court of admiralty, has the power to suffer amendments to be made to the pleadings, so as to let in new evidence and new grounds of defence. *Reppert v. Robinson*, 492.

6. But this power ought always to be exercised with caution, and for the purposes of justice, and to bring the merits of the controversy fairly before the court; it would hardly be consistent with these principles, to permit an amendment to be made, where the only effect it could produce, would be, the defeat of the present suit, and driving the libellant to another forum to recover a claim, admitted to be due, and the justice of which is not disputed: *Held*, also, that the same objection applied to a defence raised in the circuit court, that the repairs were made by the libellant and another as partners, both of whom were still living, and both of whom had taken the benefit of the insolvent laws, since the work was done; that it was purely a technical defence, and if

## AMENDMENT.

it had been raised in the district court, the libel could have been amended so as to obviate the difficulty. *Ibid.*

## APPEAL.

AMENDMENT, 1, 2, 5.

1. An appeal from the decision of the official appraisers to that of merchant appraisers was made by the importers; but on the official appraisers demanding of them the production of all documents connected with the importation, they refused to comply with the demand, withdrew the appeal, and paid the duties under protest: *Held*, that the parties, by withdrawing their appeal, and refusing to produce the papers called for, had fixed the correctness of the appraisement. *Barllett v. Kane*, 186.

2. It is the *claim* of the libellant, and the answer of the respondent, denying the claim, that make the controversy, and ascertain the amount in dispute, so as to give jurisdiction to the circuit court, on appeal. *Agnew v. Dorman*, 386.

3. Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony may be received, upon appeal, to show its value, and to sustain the jurisdiction of the court. *Ibid.*

4. And so too, as to the value of an office, where the right to the office is the matter in controversy. *Ibid.*

5. But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court. *Ibid.*

6. In an appeal from the district court, the judgment of that court is to be regarded as correct, unless the appellant can show it to be erroneous; the burden of proof is upon him. In a case involving purely a question of fact, depending upon the testimony of a multitude of witnesses, whose statements are inconsistent with each other in material and essential particulars, and whose relative title to credibility is to be carefully weighed and scrutinized, nothing but the firmest and clearest conviction that the district court has fallen into error, will justify the circuit court in reversing the judgment. *Taylor v. Harwood*, 437.

7. New testimony introduced in an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the district court. *Ibid.*

## APPRAISEMENT.

1. An appraisement made under the act of 30th August 1842, by merchant appraisers, appointed by the collector of customs, to appraise and value imported goods, in a case of dissatisfaction on the part of the

## APPRAISEMENT.

importer with the official appraisement, is final, and must be deemed and taken to be the true value of the goods, and the duties must be levied upon them accordingly. *Tucker v. Kane*, 146.

2. The appraisers are referees appointed to decide between the officers of the government and the importers. *Ibid.*

3. The law does not require that the appraisement of the merchant appraisers should have all the formalities and precision of a common law award, nor is it necessary to set forth the principles upon which they acted, nor the evidence by which they were governed. *Ibid.*

4. If it could even be proved that there was evidence before them sufficient to show that their decision was against the weight of evidence, yet their judgment could not, on that account, be reversed; there is no tribunal authorized to review it; the law makes it final as to the question of value. *Ibid.*

5. If, indeed, it appeared on the face of the appraisement, that they merely intended to ascertain the price paid for the article, and not its market value in the principal markets in the country, the appraisement would be a nullity. *Ibid.*

6. The construction of their award cannot be influenced by the knowledge of the secretary of the treasury, that there was evidence before them, which ought, in his judgment, to have produced a higher valuation. *Ibid.*

7. The appraisement must speak for itself, and be construed by its own language; if its validity is to be impeached by anything outside of the award, it must be by testimony showing that the question referred was not decided, or some misconduct in the appraisers. *Ibid.*

8. The twenty-third and twenty-fourth sections of the act of 30th August 1842, do not confer upon the secretary of the treasury, the power to set aside the appraisement, because, from the terms used by the appraisers, and his knowledge of the evidence before them, he was of opinion, that they intended to estimate the value of the importation, at its cost to the importers, and not at the general market value. *Ibid.*

9. The appraisement, if a nullity at all, is so, independently of his decision, and he has no power to review it. *Ibid.*

10. The twenty-third section of the act of congress authorizes the secretary to establish rules and regulations to secure a just and impartial appraisal, and all appraisers, official or merchant, are bound by the rules and regulations. But they are merely modes of proceeding by which the appraisers are to obtain evidence and ascertain the value; the valuation they make, under these rules and regulations, must be their own impartial judgment, and the secretary cannot set it aside, because he is of opinion that it is against the weight of evidence. *Ibid.*

11. The twenty-fourth section of the act does not apply to an appraisement regularly made by merchant appraisers. *Ibid.*

12. During the pendency of an appeal, under this act, made by the importer, it is the duty of the collector to proceed, until he has obtained

## APPRAISEMENT.

a valid appraisement by merchant appraisers; and until this is done, he has no right (after the appeal is made), to exact duties on the enhanced valuation of the *official* appraisers, nor the penal duty which may follow this valuation. *Ibid.*

13. The importer is not bound to make a second appeal, nor is the collector authorized to charge and collect the duties, as if the decision of the *official* appraisers were final and conclusive, while the appeal from their decision is still pending and undecided. *Ibid.*

14. In an action against the collector of customs, to recover duties paid under protest, on an importation of Peruvian bark, where it appeared, that the official appraisers, under instructions of the secretary of the treasury, had predicated their valuation of the bark on the quantity of sulphate of quinine produced by the several packages in the invoice: *Held*, that the secretary of the treasury had no power to fix a chemical analysis of bark as the only test of its dutiable value. *Bartlett v. Kane*, 186.

15. The law of congress fixes the duties upon the market value at the port of exportation; the purchaser must and can only look at the fair market value of the article among those trading in it at the port of exportation; and he can only be required to adopt the methods usually adopted by merchants in making purchases. *Ibid.*

16. Still, the appraisers, when they suspect a wrong done to the government, have a right to employ this means as a test, by which, with the other knowledge and information in their power, they may be able to arrive at a correct estimate of the true value of the article imported. *Ibid.*

17. An appeal from the decision of the official appraisers to that of merchant appraisers was made by the importers; but on the official appraisers demanding of them the production of all documents connected with the importation, they refused to comply with the demand, withdrew the appeal, and paid the duties under protest: *Held*, that the parties, by withdrawing their appeal, and refusing to produce the papers called for, had fixed the correctness of the appraisement. *Ibid.*

18. The appraisers had the right to call for these papers, whether with the view of correcting their own judgment, if erroneous, or of laying them before the merchant appraisers, in the event of a prosecution of the appeal. *Ibid.*

19. A refusal to produce papers admitted to be in a party's possession, raises the strongest inference that the papers, if produced, would operate against the person holding them. *Ibid.*

20. The act of congress (30th August 1842, sect. 17) makes it, in such a case as this, conclusive proof, that the papers, when produced, would be demonstrative against the pretensions of the party having them in his possession. *Ibid.*

21. A demand for these papers could properly be made by the official appraisers, even after their own decision had been given. *Ibid.*



## APPROPRIATION OF PAYMENTS.

1. According to the principles upon which payments are appropriated, the debtor, if he pleases, has a right to make the appropriation; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. *Jones v. The Ratler*, 456.

2. In cases of running accounts between the parties, unless there are some particular circumstances to vary the rule, the payments ought to be applied to extinguish the debts according to priority of time. *Ibid.*

## ASSIGNMENT.

ADMIRALTY, 6-7.

## BANK-NOTES.

1. Where a bank-note is taken in the usual course of business, *bonâ fide*, and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business, that it was lost by, or stolen from, the rightful owner, and was not the property of the person who then held it, the fact of its having been lost or stolen from the rightful owner, will be no defence to an action on the note brought by the person so taking it. *City Bank v. Farmers' and Planters' Bank*, 119.

2. But such defence will be a good one, if the note were taken under circumstances which ought to have excited the suspicion of a person of ordinary prudence and caution, and led him to make inquiry before the note was taken by him. *Ibid.*

## BANKS.

1. Bank-stock was bequeathed to the testator's executors, and the survivor of them, to pay the dividends to one for life, with remainder over; and the executors were, by a decree in chancery, directed to hold the same in trust to pay the dividends to the devisee for life, and after her death, to divide the stock between those in remainder. The testator died rich; and several years after his death, and after all of his debts were paid, one of the executors pledged the stock, which was still standing in the testator's name, to another bank to secure his individual debt; the debt being afterwards paid, the stock was transferred to T. J. & Co., one of the executors being the sole member of that firm, and was by him re-transferred into the names of himself and his co-executor, as executors. Afterwards he, signing his name as acting executor, again pledged the stock to the said bank, to secure other debts of the firm of T. J. & Co.; and a note, for which said stock was held in pledge, not being paid, in consequence of the failure and entire insolvency of the firm of T. J. & Co., the stock was sold, and the proceeds applied to its payment, leaving a balance in the hands of the bank. The last dividend on the stock, before it was sold, was received and retained by the bank; but the other dividends, which accrued whilst the stock was in pledge, were received by the said executor; those first received were paid over

## BANKS.

by him to the legatee for life, but the others were not. On a bill filed by the legatee for life; who was an alien residing in Ireland, to recover the dividends due to her: *Held*, that as the bank, to whom the stock was pledged, paid a valuable consideration for it, and had no notice, actual or constructive, of any violation of trust, upon which the transfer could be impeached in equity, it had a right to sell the stock for payment of the note for which it was pledged, and to make the purchasers a valid title. *Lowry v. Commercial and Farmers' Bank*, 310.

2. That purchasers of stock are not bound to look beyond the certificate, or to examine the books of the corporation, to ascertain the validity of the transfer. *Ibid*.

3. But the corporation whose stock is transferred, is made the custodian of the shares, and is clothed with power to protect the rights of every one from unauthorized transfers. It is a trust placed in its hands for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper diligence and care; and is responsible for any injury sustained by its negligence and misconduct. *Ibid*.

4. As the corporation appoints the officers before whom the transfers of stock must be made, it is responsible for their acts, and must answer for their negligence or default, whenever the rights of a third person are concerned. *Ibid*.

5. In this case, the rights of stockholders and persons interested in its stock were placed by law under the guardianship and protection of the bank, so far as concerned the transfer on their books. *Ibid*.

6. If these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction. *Ibid*.

7. The transfer having been made by one of the executors, his character of executor, of itself, was notice that there was a will open to inspection upon the public records; the bank, therefore, when the transfer was proposed to be made, was bound to take notice of the will, and is chargeable to the same extent as if it had actually read it. *Ibid*.

8. This stock, although specially bequeathed, was liable to be sold to pay the testator's debts; and if the bank did not know, or had no reasonable ground for supposing, that the executor was misapplying the assets, it would not be responsible, notwithstanding its implied knowledge of the will. *Ibid*.

9. The bank is equally chargeable for the neglect or omission of duty of the officer to whom it had committed the superintendence of the transfers of stock, as for the neglect or omission of its president; and such officer is also equally chargeable with implied notice of the will,

## BANKS.

and was bound to refuse the transfer, when he saw that the executor was using this stock in violation of his trust as executor. *Ibid.*

10. The proposition of one of two executors (the other executor not uniting in the transfer) to transfer this stock, so long after the death of a wealthy testator, without first obtaining an order from the court to justify him, must have satisfied any man of common experience in business, that he was grossly abusing his trust. *Ibid.*

11. A bank or other corporation is bound by the same obligations, moral and legal (when the rights of third parties are concerned), that apply to the case of an individual, unless explicitly exempted by law; and if an individual, who confederates with an executor and assists him in defrauding his *cestui que trust*, is liable to the party injured, there can be no reason why a bank, which knowingly enables an executor to convert the property of the *cestui que trust* to his own private use, should not be equally responsible. *Ibid.*

12. Under the act of 1798, sect. 3, an order of the orphans' court, for the sale of the stock, would protect the bank from all responsibility. *Ibid.*

13. Another bank being induced, relying on the certificate of stock, to loan its money upon it, without knowledge that the stock had ever belonged to the testator, or been transferred by his executor, the stock cannot be followed in its hands, or in the hands of those to whom it afterwards sold it, and be charged with the trusts created by the will. *Ibid.*

## BILLS OF EXCEPTION.

1. The court will not seal a bill of exceptions presented two years after the trial; unless satisfied that there was error in the instructions given to the jury. *Greenway v. Gaither*, 227.

## BILLS OF LADING.

CARRIERS, 8, 15.

FREIGHT, 6, 10.

1. The bill of lading is an instrument founded in the usages of trade, and not connected with any of the peculiar doctrines of the common law. *Naylor v. Baltzell*, 55.

## BONDS.

1. The bond given by the master of a vessel, bound to a foreign port, under the 1st section of the act of 28th February 1803, conditioned for the return of the crew to the United States, does not embrace the case of a vessel sold in a foreign port, and which does not return to the United States. *Montell v. United States*, 24.

2. It does not extend to cases where the seaman is lawfully separated from the ship, or is separated from her without the fault of the master or owner. *Ibid.*

3. It applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continue subject to the

## BONDS.

lawful authority of the master, and where it was in his power to bring them home. *Ibid.*

4. An action at common law, upon a bond, must be determined according to the rules at common law, and without reference to the relief which the defendant might obtain in a court of equity. *Culbertson v. Stillinger*, 75.

5. A bond given by an executor for the payment, to his surety, of one-half of his commissions, from time to time, as they may be allowed, in consideration of his consenting to become such surety, is a valid instrument. *Ibid.*

6. The law will not annex to such a bond a condition precedent, that the surety shall continue solvent till the estate is finally settled, before he will be entitled to any of such commissions. *Ibid.*

## BOTTOMRY.

1. It is not in the power of a master of a vessel, by any terms inserted in a bottomry-bond, to make the owners personally responsible, beyond the value of the ship and freight. *Naylor v. Baltzell*, 55.

2. A bottomry-bond executed by the master, hypothecating as well the cargo as the ship and freight, will not render the owners of the ship personally responsible to the owners of the cargo, beyond the value of the ship and freight. *Ibid.*

3. The master has the power to pledge the ship and freight only in cases of necessity—that is to say, where it is necessary for the interest of the owner, or there is reasonable ground to believe it will be for his interest; and the lender on bottomry is bound to show the existence of this necessity, otherwise he is not entitled to recover, even against the ship and freight. *Ibid.*

4. And because it may sometimes be for the interest of the cargo to have the vessel repaired, the power is given to the master to sell a part, or hypothecate the whole, if necessary, to raise funds for that purpose; but the lender must show that the necessity existed, otherwise, he is not entitled to recover on his bond. *Ibid.*

5. If the owner of the cargo stand by and suffer the cargo to be sold under the bottomry-bond, without requiring evidence of the necessity for the repairs, it will not avail him, in an action against the ship-owners, to show that the necessity did not exist. *Ibid.*

6. T., the owner of a vessel, of which F. was the master, directed her to be employed in running between Savannah and Havana, under a letter of instructions; a cargo of rice was procured, and put on board at Savannah, on the credit of S., the agent of the vessel at that place; in fitting her for the voyage, expenses were incurred to the amount of \$219 52, for which a bill was drawn by the master on the owner, living in Baltimore, and accepted by him; this bill was protested, and demand was made upon the master, at Havana, for its payment; A., the consignee at Havana, gave the master a bill on a house in Boston, to reim-

## BOTTOMRY.

burse S. for the rice which was procured on his credit, and two days before advanced the master \$229 and 4 reals, to take up the protested bill of exchange drawn by him on the owner. While the vessel remained at Havana, supplies were furnished her, and money advanced to the master, by A., her consignee at that place; when the vessel was about to sail again from Havana, bound to Baltimore, a bottomry-bond was executed by the master, in favor of A., the consignee, for the sums advanced by the latter; in an action on this bond: *Held*, that in relation to the bill of exchange for \$600, the proceeds of the cargo, and the freight also, might lawfully have been applied by the consignee to pay what was due on the rice, provided the master acted, in regard to the cargo, within the scope of the letter of instructions; and the application of the freight to this purpose would not impair the consignee's right to the bond subsequently taken for supplies afterwards furnished. *Thomas v. Gittings*, 472.

7. That the money was properly advanced to take up the protested bill of exchange, as it was stated in the bill itself, that the money was due for disbursements for the vessel, and chargeable to her account, and the owner, by accepting it, admitted that the disbursements were so made and to be so charged. *Ibid*.

8. The person who furnished the supplies, for which the bill of exchange was given, waived his lien on the vessel, by taking the bill, and suffering the vessel to proceed on her voyage; but when the owner afterwards refused to pay the bill, and sent the creditor to demand payment from the master, in a foreign port, he must be regarded as authorizing the master to raise the money upon the vessel itself, if he had no other means. *Ibid*.

9. If the supplies furnished, and the expenses paid and money advanced at Havana, were necessary for the vessel, they were a sufficient foundation for the bottomry-bond to the extent of such supplies, expenses and advances, provided they were furnished on the credit of the vessel; they will not be presumed to have been made and furnished upon the personal credit of the owner or master alone, unless the fact is proved by testimony. The necessity for such supplies need not have been so urgent that the vessel must have been lost to the owner without them; it is sufficient, if, as matters then stood, they may, in the exercise of a discreet and honest judgment, have appeared to be reasonable and proper for the interest of the owner. *Ibid*.

10. The specific objects to which the money was applied, that was advanced to the master, must be shown, in order that the court may judge of the necessity, upon the proof offered. *Ibid*.

## BEECH.

CARRIERS, 9.

RIGHT OF ACTION.

## BURDEN OF PROOF.

COPYRIGHT, 4.

LIENS, 14.

PATENTS, 1.

## CAPTURE.

SEAMEN'S WAGES, 3-4.

## CARRIERS.

1. Where plaintiff sued the proprietors of a line of stage-coaches for damages sustained by his wife, through the upsetting of one of their coaches: *Held*, that the plaintiff having proved that the carriage was upset and his wife injured, it was incumbent on the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver. *Saltonstall v. Stockton*, 11.

2. Every one that undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care, the traveller can be carried in safety; when, therefore, a passenger is injured, the presumption is, that it has been occasioned by negligence. *Ibid*.

3. Justice, as well as the principles of evidence adopted in analogous cases, require, that any disaster by which a passenger suffers, should be *primâ facie* evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary. *Ibid*.

4. Where the plaintiff imputes the accident to the misconduct of the driver, it is incumbent upon the defendant to prove that the driver possessed and exercised that degree of skill which competent drivers, employed in like business, usually possess, and ought to possess, in order to convey the passenger with safety and comfort, and that he exercised, at the time of the accident, the utmost prudence and caution. *Ibid*.

5. The law requires of him a high degree of caution and prudence, and the least negligence on his part, which produces bodily injury to the passenger, will render the carrier liable. Unless the jury find that such skill and such care were used, the plaintiff is entitled to recover; provided, nothing was done by the passenger, which absolves the defendant from this liability. *Ibid*.

6. Those who undertake the business of carrying persons are regarded by law as if they were in the public service, and the carrier cannot refuse to take any one of good character, who conducts himself properly and pays the usual fare—provided he have room for him—and if he refuse, he is liable to an action. *Ibid*.

7. Neglect of duty on the part of a carrier of persons, is a tort; and if an individual be injured by it, his rights, and the liability of the defendant, must depend upon the principles which govern in cases

## CARRIERS.

of tort, where a breach of a legal duty has been committed, and an individual suffers from it. *Ibid.*

8. Where goods are shipped on board a vessel advertised to sail for a particular port, and a bill of lading is signed for their delivery at that port, the ship-owners are bound to carry the goods, *by that ship*, to the port of destination, unless prevented by some event beyond their control. *Harrison v. Stewart*, 485.

9. A refusal to perform the voyage, without any legal justification, renders them liable to damages for their breach of contract. *Ibid.*

10. In such case, if the consignee of the goods be merely the agent of the shippers, the latter are the proper parties to the suit, and entitled to recover the damages sustained. *Ibid.*

11. Where, under the above circumstances, the ship-owners offered to return the goods, and the offer was not accepted, the measure of damages to the shippers is not the full value of the goods: damages to that amount are given to the owner when the property is withheld from him against his consent, or has been lost through the misconduct of the defendant. *Ibid.*

12. The ship-owners were not bound to buy the goods because they had broken their contract; but were bound to make compensation for the damages sustained by its non-performance. *Ibid.*

13. Neither could the opportunity which offered of shipping the goods by another vessel, without any additional cost or risk to the owners of them, be used as a bar, or in mitigation of damages; the shippers were not bound to seek or accept any other mode of conveyance, and it was the duty of the ship-owners to transport the goods in the manner specified in the bill of lading. *Ibid.*

14. The damage to the owners of the goods is, the difference in value between the goods at the port of shipment, and the price they would have commanded at the port of destination, if the contract had been performed; profits that the shippers might have made by ulterior speculations, or by shipping them from the port of destination to other places and better markets, are too remote to be taken into consideration in estimating the damages arising from the breach of the contract. *Ibid.*

15. Where goods are shipped under a bill of lading, by the terms of which the ship-owners are exempted from responsibility for losses by perils of the sea; and a part of the goods are lost or injured: *Held*, that as a loss by perils of the sea is an exception to the undertaking of the carriers to deliver the cargo safely at the port of delivery, it is incumbent upon them to show that the loss in question was occasioned by such peril; otherwise, they are liable for the whole damage sustained. *Hooper v. Rathbone*, 519.

16. The ship was on a voyage from Baltimore to Liverpool, with a cargo of wheat and tobacco; on the first day out from the capes of the Chesapeake Bay, and for several days after, she experienced heavy

## CARRIERS.

weather, and became leaky, the pumps became obstructed, and finally choked from the wheat getting into them; and as a measure of safety she was compelled to put into the port of St. Thomas; there she was unloaded, in order to repair, and a good deal of the wheat was found to be spoiled, and was thrown away. The storm was not violent enough to dismast her or carry away her sails, but it blew heavily; the sea was rough, and the ship was rolling and pitching in it, and shipped a good deal of water before any inconvenience was experienced from the wheat in the pumps. The ship was proved to have been among the strongest ever built in Baltimore; the bin where the wheat was stowed was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her: *Held*, that under the circumstances, there was nothing to which the disaster could be imputed, but the perils of the sea. *Ibid.*

17. Although a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargoes, and may be disabled from proceeding on her voyage, by encountering winds and waves through which a different cargo might pass without injury; yet, if there was no fault in the ship, in her equipments, in the stowing of the cargo, or in the manner in which she was navigated, and if every precaution was taken which is usual and customary in transporting such a cargo, the owners cannot be charged with the loss. *Ibid.*

18. After unloading the ship at St. Thomas, the wheat had to be reshipped in bags, and owing to the greater space occupied by the wheat in bags, than was occupied by it in bulk, and owing also to the want of proper contrivances at St. Thomas for stowing the hogsheads of tobacco, 1169 bags of damaged wheat were necessarily left out; there was no trade between Liverpool and St. Thomas, and no prospect of shipping the surplus wheat, except by chartering a vessel at a losing expense; which expense would only have been increased by storing the wheat at St. Thomas, till the owners could be advised, and instructions received from them: *Held*, that under such circumstances, the most judicious course, and the one most for the advantage of the owners, was for the master to sell the wheat at St. Thomas. *Ibid.*

## CHALLENGE.

1. In indictments for capital offences, under the act of 30 April 1790, the prisoner may challenge twenty jurors peremptorily, and no more; in offences made capital since that act, he is entitled to thirty-five peremptory challenges, according to the rules of the common law. *United States v. Dow*, 34.

## CHARITABLE USES.

1. A citizen of Maryland, by his will, dated the 6th of March 1836, bequeathed "to the Education Society of Virginia for the benefit of the theological students at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars,



## CHARITABLE USES.

the interest only to be annually expended;" the object of the bequest was an unincorporated and voluntary association of individuals to take in succession; on a bill filed to enforce this bequest: *Held*, that the case must be governed by those of *Dashiell v. Attorney-General*, and consequently, the bequest was void. *Meade v. Beale*, 339.

2. It does not follow that, because such a bequest would be maintained in England, independently of the statute of 43 Eliz. ch. 4, it will also be maintained in Maryland. *Ibid*.

3. The case of *Vidal v. Girard College*, does not affect this case, as the decision of that case was founded on the common law of Pennsylvania. *Ibid*.

4. This case must be decided on the doctrines of the Maryland law, as recognised and established by judicial decisions; and the two cases of *Dashiell v. Attorney-General* are conclusive against the validity of the bequest in question. *Ibid*.

## CHARTER-PARTY.

## FREIGHT 1-2, 10-11.

1. On the 21st of September 1854, the libellants, who were residents of Boston, chartered their vessel, then in the port of New York, to the respondent, for a voyage from the port of Franklin, in Louisiana, to Baltimore; the respondent to load her with sugar and molasses, as specified in the charter-party, and upon the freight therein mentioned; the charter to commence when the vessel was ready to receive cargo at the place of loading, and notice thereof given to the charterer or his agent. The charter-party contained a provision that the vessel was to have the privilege of proceeding to a southern port, and load a cargo of lumber for the West Indies, and on the discharge of the cargo, to proceed direct to Franklin; under this provision, the owners, on the 23d of September, while the vessel was still at New York, chartered her to another person, for a voyage from Wilmington, in North Carolina, to Basseterre, in the Island of Guadeloupe, with a load of lumber. She sailed from New York on the 4th of October, arrived at Wilmington on the 8th of October, and sailed thence on the 2d of November, with a cargo of lumber for Basseterre; on the 5th of November, she was overtaken by a storm, and compelled to put into Nassau for repairs, and was detained there till the 4th of February 1855; on that day, she sailed for Basseterre, and after discharging her cargo, sailed thence for Franklin, and arrived at Pattersonville, a few miles below Franklin, on the 13th of April 1855. As soon as she arrived, the master called on the consignee, who was the agent of the respondent, and asked for his cargo; the agent told him he had no cargo, but would see if he could get one, and the master then commenced getting ready to take the cargo on board; in a few days, he notified the agent that the ship was ready to receive cargo, to which he replied, that he did not think the charter-party binding, and that he had no cargo for him; after receiving this

## CHARTER-PARTY.

answer, the vessel remained six or seven days at Pattersonville, and then sailed for Baltimore. By the terms of the charter-party the respondent was entitled to twenty running days to load the vessel, but she did not remain at Pattersonville more than half that time, and sailed for Baltimore in consequence of the answer received from the consignee: but for the delay at Nassau, the vessel would have arrived at Franklin during the usual season for shipping sugar and molasses from that region, which commences in November, and was proved by some witnesses to end by the 1st of March, and by others to continue during that month; and with regard to the delay at Nassau, the persons who surveyed the vessel when she arrived there, and those who repaired her, and assisted in landing her cargo, and in reshipping it, and fitting her to sail again, were examined, and testified that there was no unnecessary delay. *Hall v. Hurlbut*, 589.

2. On libel filed in the admiralty by the owners of the vessel, against the charterer, to recover damages for the refusal to furnish the vessel with cargo: *Held*, that although there was no stipulation as to the time of sailing from New York, or as to the time to be consumed in the intermediate voyage, the law implied a covenant on the part of the ship-owners, that she would proceed to the port of destination with convenient speed, and use reasonable and proper exertions to reach it as early as practicable. *Ibid*.

3. If the vessel wasted more time than was necessary in the intermediate voyage, or at any of the ports she entered, whether in repairing, or receiving or delivering cargo, the owners have no right to complain of a failure on the part of the shipper to furnish her with a cargo, if his inability to do so were caused by such unnecessary waste of time. *Ibid*.

4. The circumstances above stated indicate no want of proper diligence on the part of the owners, or the master. *Ibid*.

5. In the absence of any fault on their part, the unusual delay of the vessel, and her arrival at the port where she was to take in cargo, after the season for shipping it had gone by, did not release the charterer from the obligation to furnish the cargo stipulated for by the charter-party. *Ibid*.

6. In considering the question of delay for repairs at Nassau, no comparison ought to be made between the time occupied at Nassau, and the time that would be occupied in similar work in Baltimore, because the time required must depend upon the facilities which the port affords for landing and reshipping cargo and repairing damages. *Ibid*.

7. Where the charter-party contains no stipulation that the vessel shall arrive at the port of shipment by a particular day, the shipper takes the risk of delay or detention by any superior force which the vessel could not resist or overcome. *Ibid*.

8. The omission of the vessel to remain at Franklin the number of lay-days mentioned in the charter-party, after the master had been in-

## CHARTER-PARTY.

formed that a cargo would not be furnished, and the binding effect of the contract was denied, is no bar to the libellants' claim. *Ibid.*

9. The fact that in making charter-parties for the sugar and molasses trade, it is the usage to make them with reference to the season, cannot affect the legal construction of the written contract. *Ibid.*

10. In a case like the present, at common law, the plaintiffs would be entitled to recover the full amount of freight that would have been earned if the cargo agreed on had been furnished. *Ibid.*

11. But in an admiralty proceeding, where the equity as well as the law of the case is before the court, the omission to give notice of the disaster which detained the vessel so long beyond her time, must exercise a serious influence in estimating the damages which the libellants are justly and equitably entitled to, and throw upon them a portion of the loss occasioned by such omission. *Ibid.*

## COLLISION.

## ADMIRALTY, 1.

1. The omission of a known legal duty, is such strong evidence of negligence and carelessness, that, in a case of collision, where one of the vessels did not carry the light required by law, she should be held altogether in fault, unless clear and indisputable evidence be established to the contrary. *Taylor v. Harwood*, 437.

2. When all the witnesses are equally trustworthy, it is not by the number that the court must be governed; but rather by the means of knowledge they respectively possessed. *Ibid.*

3. Where a vessel was at anchor at night, in the Patapsco river, in the channel through which sea-going vessels must pass in going to and from Baltimore, with no light set and no look-out, the wind blowing an eight knot breeze, and was run into by another vessel: *Held*, that there was gross negligence on the part of the vessel at anchor. *Cohen v. The Mary T. Wilder*, 567.

4. In the position in which she was anchored, it was her duty to have shown a light, during the period of darkness, and also to have had a look-out, competent to perform his duty, and who diligently performed it. *Ibid.*

5. The omission either to set a light, or to have a competent look-out, was culpable negligence, and made the vessel liable for any damage another vessel might sustain by running into her in the dark, unless the colliding vessel was also in fault, and contributed to the disaster by some want of care or skill on her part. *Ibid.*

6. But if the disaster was, in any degree, occasioned by the want of proper care and vigilance on the part of the vessel under weigh, she must share the loss, notwithstanding there was gross negligence on the part of the vessel at anchor. *Ibid.*

7. The want of a light on board the colliding vessel cannot affect the case, as this did not in any degree contribute to the disaster, and could

## COLLISION.

have exercised no influence in preventing it; inasmuch as there was nobody on the deck of the vessel at anchor to see it, and to exhibit a light in return, or to hail the other vessel on her approach. *Ibid.*

8. A vessel at anchor in a public channel, on a dark and stormy night, without having the proper signal-lights set, can have no claim for damages sustained from a collision with another vessel. *Green v. The Adelaide*, 575.

9. But where such lights are set, and are not seen by the vessel under weigh, until within fifty yards of the other vessel, and unskilfulness is displayed in the measures then used by the vessel under weigh, to avoid a collision, she will be held responsible for the consequences thereof. *Ibid.*

10. If a steamboat approach so near a sailing vessel, without any fault on her part, as to create a reasonable apprehension that a change in the course is necessary to save the vessel or the lives of the crew, and an error of the moment, committed by the helmsman or look-out, bring on the disaster he meant to avoid, such error will not be regarded as a fault; the steamboat alone is responsible, and must answer the loss. *Haney v. The Louisiana*, 602.

## COMPENSATION.

PUBLIC OFFICERS, 1.

## COMPETENCY.

WITNESSES.

## CONDITION.

PRINCIPAL AND SURETY, 2, 5.

## CONFLICT OF LAWS.

1. The law of the domicile of the party does not govern the contract, nor determine his rights or obligations; they depend upon the law of the place where it was made, or where it was to be executed. *Naylor v. Baltzell*, 55.

## CONSIDERATION.

CONTRACT, 1.

1. In ordinary cases, general declarations made by the party for whom a vessel is built, after the work is done or the materials furnished, that he will pay all bills against the ship, will not bind him, and cannot be enforced in a court of justice. *Leslie v. Glass*, 422.

2. Such promises made after the work is done are without consideration, and cannot, on that account, be enforced. *Ibid.*

3. But if, while the vessel is being built, the person for whom she is being built makes advances to the shipwright beyond the sums mentioned in their contract, and takes from him an assignment of all his "right, title and interest in the vessel as she advances in construction, together with all materials collected and to be collected from the same,"

## CONSIDERATION.

and conceals the fact of such assignment, with a view to preserve the shipwright's credit, and enable him, under such false credit, to obtain work and materials for the vessel, without subjecting the assignee to responsibility for the same, this would constitute a design which a court of justice can never sanction. *Ibid.*

4. The effect of such an assignment would be to divest the shipwright of all interest in the vessel; she would become from that moment the exclusive property of the assignee, not by way of mortgage, but absolutely; all the work already done upon her, as well as all that should be afterwards done, would be for his use and benefit; and all the materials already purchased, or afterwards to be purchased, became his property as soon as they were delivered. *Ibid.*

5. Although the creditors, at the time the accounts were created, supposed that the shipwright still retained his interest in the vessel, and that he was dealing with them on his own account, still, all the work done, and materials furnished, after the date of the secret assignment, were for the use of the assignee alone, and justice requires that he should pay the value of them; and this constituted a sufficient and valuable consideration to support his promise to pay. *Ibid.*

6. Since, by virtue of the transfer, the assignee obtained all the materials which had been already bought, whether worked up or not, and also the benefit of all the labor which had been already bestowed upon the vessel, there existed a sufficient consideration, in relation to the antecedent portions of the work and materials, as well as the subsequent. *Ibid.*

7. The taking of certain bills receivable, or his own note, from the shipwright, by one of the creditors, while in ignorance of the secret transfer, would not impair his right to proceed against the assignee, in the event of the security so taken turning out to be worthless. *Ibid.*

8. The extent of the shipwright's property in the vessel before the assignment cannot affect the principle upon which the case is to be decided, if he had an interest to any extent; whatever that interest was, it passed out of him by the assignment, and the vessel, as she advanced in construction, and the materials were collected for her, became the exclusive property of the assignee, and the shipwright had no longer that interest in them which would have belonged to him by his original contract. *Ibid.*

## CONSTITUTIONAL LAW.

1. In the second section of the 8d article of the Constitution of the United States, it is declared, that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction:" *Held*, that this does not conflict with and render unconstitutional the act of 24th September 1789, sect. 9, giving jurisdiction to the district court of the United States, in civil cases, against consuls and vice-consuls. *Gittings v. Crawford*, 1.

## CONSTITUTIONAL LAW.

2. Under the Constitution of the United States, congress is the only power which can authorize the suspension of the privilege of the writ of habeas corpus. *Ex parte Merryman*, 246.

## CONSTRUCTION.

PASSENGERS, 8.

1. The construction of a law by the navy department, and the practice under it, cannot be allowed to alter the law, or to control its construction in a court of justice. *Goldsborough v. United States*, 80.

## CONSULS.

1. A consul is not entitled, *by the laws of nations*, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides. *Gittings v. Crawford*, 1.

2. In the second section of the 3d article of the Constitution of the United States, it is declared, that "in all cases affecting ambassadors, other public ministers, *and consuls*, and those in which a state shall be a party, the supreme court shall have original jurisdiction:" *Held*, that this does not conflict with and render unconstitutional the act of 24th September 1789, sect. 9, giving jurisdiction to the district court of the United States, in civil cases, against consuls and vice-consuls. *Ibid*.

## CONTEMPT.

1. On a bill, filed in January 1852, praying that certain money held in trust by the defendant might be ordered to be brought into court, the defendant answered, admitting that he had the money in his hands, but resisting the claim to it set up by the complainant: on the 2d of November 1852, some months after the defendant had answered the bill, a petition was filed by the complainant, asking that the money might be brought into court, and on this petition an order was passed, directing the defendant to pay the money into court, or show cause for not doing so: the defendant did not obey the order, and excused his so doing, on the ground that the complainant was not entitled to the money, and that he had paid it away to the persons who were entitled: thereupon, a peremptory order was passed, requiring him to bring the money into court, but, in indulgence to him, a proviso was annexed, that a bond with security should be deemed a compliance with the order: this order was also disobeyed by the defendant, and his answer was put in, assigning the same reason as before for refusing to comply with it: *Held*, that the defendant was guilty of contempt in parting with the fund, whilst the question as to its disposition was pending before the court. *Wartman v. Wartman*, 362.

2. The assertion of want of title in the complainant, was a question to be decided upon the final hearing; the only question upon the order was, as to the safety of the trust fund, pending the litigation, so that it might be forthcoming when the rights of the parties were finally decided. *Ibid*.

## CONTEMPT.

3. As to the request, in the answer to the second petition, that the order be suspended till the final hearing, it was nothing more nor less than an application to the court to abandon the measures it had taken to secure the fund, because the defendant had determined not to comply with its orders. *Ibid.*

4. The defendant, being in contempt for disobedience to the authority of the court, was not entitled to be heard on any motion, nor authorized to take testimony, nor to proceed in any other manner, until he purged himself of the contempt. *Ibid.*

5. After arrest and commitment, it was not admissible for the party to apply to have the attachment set aside, and the question of his commitment heard, on the ground that his non-compliance with the order of the court arose from his inability so to do, and not from an intention to contemn the court's authority; that he had been informed by his counsel that nothing would be done with the attachment till the following term, when the whole case would be settled; and that he had been busy since in procuring testimony, in order to prepare the case for a final hearing, and to show that the complainant had no right to the fund. *Ibid.*

6. Before the attachment was issued, opportunity had been given him to show cause against it, and if any such cause existed, then was the time to show it. *Ibid.*

7. The question whether a contempt has or has not been committed does not depend on the intention of the party, but on the act done. *Ibid.*

8. Contempt is a conclusion of law from the act; and disobedience to the legitimate authority of the court is, by law, a contempt, unless the party can show sufficient cause to excuse it. *Ibid.*

9. If the defendant was not able, at the time he distributed the trust fund, to replace it, in case the court should order it to be brought in, or should finally decree in favor of the complainant, the distribution he made was not only in contempt of the authority of the court, but a fraudulent attempt to defeat the just rights of the complainant, if the decision should be ultimately in his favor. *Ibid.*

10. If the matter were postponed till the time of the final hearing, it would not alter the case, as the question then to be first decided would still be upon the orders for the security of the fund; and there could be no final hearing till they were disposed of. *Ibid.*

11. If he were now actually an insolvent debtor, and his property transferred to a trustee, appointed by the proper legal tribunal, this court would discharge him from the commitment for contempt, because he would be obliged, with his petition, to return a schedule of all his property; and the fact that it was all conveyed to the insolvent trustee, would show that it was no longer in his power to pay the money into court, or give the security required for its forthcoming, if the final decision should be against him. *Ibid.*

## CONTINUANCE.

1. Where a witness was summoned to testify in a case in the district court, and did not attend, but no continuance was sought on that ground, and no summons was issued for his attendance in the circuit court, until five days before the case, on appeal, was called for trial, and his name was not called till the case was called for trial: *Held*, that his absence was no cause for a continuance. *Taylor v. Harwood*, 437.

## CONTRACT.

## CONSIDERATION.

## PRINCIPAL AND SURETY, 1.

1. No action will lie on a contract to pay for services rendered in obtaining the passage of a law through the legislature, by what are commonly termed *lobby members*, the same being against the policy of the law, and void. *Marshall v. Baltimore and Ohio Railroad Co.*, 204.

2. Such a contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the legislature the fact, that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation in money for his services, in case the law was passed by the legislature, at the session referred to in the agreement. *Ibid*.

3. If there was no actual agreement to practise such concealment, yet, the plaintiff will not be entitled to recover, if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as an agent for the defendant, and was to receive a compensation in money, in case the law passed. *Ibid*.

4. Where a defendant contracted for the purchase of a house, and agreed to pay the purchase-money in instalments, at specified periods, but afterwards repudiated the contract, in a suit brought by the vendor for the breach: *Held*, that no action could be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before the suit was instituted. *Greenway v. Gaither*, 227.

5. A notification by the defendant, that he would not fulfil his contract, did not authorize an immediate suit on it, because none of the payments to be made by the defendant were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which a suit at law could be immediately brought. *Ibid*.

6. A contract to do an act forbidden by law, is void, and cannot be enforced in a court of justice. *Dill v. Ellicott*, 233.

7. There can be no civil right where there is no legal remedy, and there can be no legal remedy, for that which is itself illegal. *Ibid*.

8. L. B. C. having contracted with the United States to build a government vessel, entered into a contract with J. D. for a portion of the work; certain *extra work* was done by J. D., by direction of the government superintendent: *Held*, that in order to charge L. B. C. for this extra work, J. D. must show, not only that the work *was not* embraced



CONTRACT.

in the specifications in his contract with L. B. C., but also that it was embraced in the contract of L. B. C. with the government. *Donohue v. Culley*, 468.

COPYRIGHT.

1. It is for the jury to determine, upon the whole evidence, whether the person obtaining a copyright for a musical composition, was the author of it or not. *Reed v. Carusi*, 72.

2. If the musical composition was borrowed altogether from a former one, or was made up of different parts, copied from older musical compositions, without any material change, and put together into one tune, with only slight and unimportant alterations or additions, then the composer was not the author, within the meaning of the act of congress. *Ibid.*

3. But the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design, and in its material and important parts, the effort of the composer's own mind. *Ibid.*

4. The copyright is *prima facie* evidence that he was the author, and the burden of proof is upon the defendant to show the contrary. *Ibid.*

5. The defendant is liable for an infringement of the copyright of a musical composition, "if he caused it to be engraved, either on the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law;" "or if he caused it to be printed for sale, in such manner and for such purpose." *Ibid.*

6. But he is not liable, unless the musical composition caused to be engraved or printed for sale by him, is the same with that for which the copyright is secured, in the main design, and in its material and important parts altered to evade the law. *Ibid.*

7. Nor is he liable, although it is the same in these respects, provided it was not taken from the piece for which the copyright was obtained, but was the effort of his own mind, or taken from an air composed by some other person who was not a plagiarist from the piece for which such copyright was obtained. *Ibid.*

8. There can be no recovery for any infraction of the copyright, not committed within two years before suit brought. *Ibid.*

9. But every printing for sale is a new infraction of the copyright, although the plates used were engraved more than two years before the institution of the action. *Ibid.*

COSTS.

1. Where an appeal is dismissed for want of jurisdiction, the court gives no costs. *Agnew v. Dorman*, 386.

2. The third section of the act of 28th February 1799, declares that "in case a clerk of a court of the United States perform any duty for which the laws of the state make no provision, the court in which such

## COSTS.

service shall be performed, shall make a reasonable compensation therefor:" *Held*, that in order to determine what is a reasonable compensation, the court must look to what the law allows in similar cases. *Case of the Clerk's Fees*, 453.

3. Whatever the legislature allows to the officer in any case, it must be supposed, they considered a reasonable compensation, and meant a compensation at the same rate, when they referred it to the court to make a reasonable allowance. *Ibid*.

4. Acting upon this principle, the fees allowed in the case of a seizure of goods in a river or creek, for a breach of the revenue laws, would seem to furnish the true rule of compensation to the clerk, in the case of a seizure upon land, for a similar breach of the revenue laws. *Ibid*.

5. As in cases of seizure within the admiralty jurisdiction, the clerk is, by the act of 18th April 1814, allowed one-half of one per cent. commission on the money deposited in court, the same allowance may be deemed reasonable, in cases of seizure made upon land, where the property seized has been condemned as forfeited and sold, and the proceeds brought into court. *Ibid*.

## CRIMINAL LAW.

## INDICTMENT.

1. In capital cases, the prisoner is entitled to a copy of the indictment, and a list of the jury, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before his arraignment. *United States v. Dow*, 34.

2. Under the act of 30 April 1790, sect. 28, the arraignment is to be regarded as the commencement of the trial; and the two entire days must be exclusive of the day of delivery of the copy of the indictment and list of jurors, and the day of the arraignment. *Ibid*.

## DAMAGES.

## CHARTER-PARTY, 10-11.

1. Where goods seized under an attachment, are proved not to be the property of the person against whom the writ is issued, the measure of damages, in an action against the attaching creditor, is the value of the goods, at the time they were attached, and such further damages, if any, as the jury may find was actually sustained by the plaintiff, by reason of the seizure. *Comly v. Fisher*, 121.

2. In such an action, the amount of rent due on the premises, at the time of the seizure, and retained by the sheriff, to be paid to the landlord, ought to be deducted by the jury from the amount of their verdict. *Ibid*.

3. On the breach of a contract for the transportation of goods by a certain vessel, the measure of damages for which the ship-owners are liable to the owners of the merchandise, is, the difference between the value of the goods at the port of shipment, and the price they would have com-

## DAMAGES.

mandated at the port of destination, if the contract had been performed; profits that the shippers might have made by ulterior speculations, or by shipping them from the port of destination to other places and better markets, are too remote to be taken into consideration in estimating the damages arising from the breach of the contract. *Harrison v. Stewart*, 485.

## DEBTOR AND CREDITOR.

1. The question whether a note or other security taken for a maritime contract, is a bar to the admiralty jurisdiction or not, depends upon the effect which the note or other security has (by the laws of the place where it is made), upon the original contract; if it discharges and extinguishes it, and stands in its place, it puts an end to the admiralty jurisdiction; and the surrender of the note cannot renew the original debt, nor restore the admiralty jurisdiction over it. *Reppert v. Robinson*, 492.

2. In Maryland, taking a due-bill does not discharge the original contract, nor extinguish the remedy upon it; and therefore, a due-bill or promissory note taken in that state, is no bar to a recovery on the original cause of action, under a libel filed in admiralty, provided the due-bill or promissory note be produced and filed at the trial, and offered to be surrendered to the respondent. *Ibid.*

3. A promissory note given for articles furnished towards the repair of a vessel, will not bar a suit in admiralty, on the original cause of action, where the libellant produces the note in court, and surrenders it. *McKim v. Kelsey*, 502.

## DEFEASANCE.

PRINCIPAL AND SURETY, 5.

## DEPARTMENTS.

PUBLIC OFFICERS, 1.

## DISCOVERY.

1. L. confessed judgment on two promissory notes, one of which was given upon a usurious, and the other upon a gambling consideration, and afterwards became insolvent, and a trustee of his estate was appointed under the insolvent laws of Maryland: the trustee filed a bill for relief from an execution issued upon the judgment, and called on the judgment creditor to state the true consideration of the notes: on demurrer to the prayer for such discovery: *Held*, that as the defendant had not objected to answering, on the ground that his answer might subject him to a penalty or forfeiture, and had not averred in his answer that the discovery sought for would bring him into any such danger, he could not avail himself of this defence on the argument. *Thomas v. Watson*, 297.

2. Even if this defence had been made in the answer, it could not be sustained: 1. Because, as to the usury, the mere making of a usurious

## DISCOVERY.

agreement, or taking a bond or other obligation to secure it, does not subject the lender to a penalty or forfeiture: 2. Because, as to the gaming, he was not asked to state the circumstances under which the money was won; he was required simply to state whether the consideration was a gaming debt or not, and there are many ways in which he might have won the money without subjecting himself to a penalty. *Ibid.*

3. Although an affirmative answer would undoubtedly prevent the party from recovering the money, yet, that is not a penalty or forfeiture, within the meaning of the law, to excuse him from answering. If the money had been paid by L. upon these two notes, the complainant might, upon a bill filed, have recovered it back. *Ibid.*

## DISTRICT COURT.

1. The district courts have jurisdiction of civil suits against consuls. *Gittings v. Crawford*, 1.

## DRAWBACK.

1. Where the penalty of twenty per cent. is imposed on an importation, because of the excess of the market value, over the invoiced value, which is paid under protest, and such importation, having only been entered for warehousing, is afterwards exported elsewhere for sale: *Held*, that the importer was not, for this reason, entitled to recover back the amount of the penalty so paid. *Bartlett v. Kane*, 186.

## DUTIES ON IMPORTS.

## APPRAISEMENT.

## PROTEST.

1. The second clause of the second section of the tariff act of 14 July 1832, provides that the duty upon blankets, "*the value whereof, at the place from whence exported, shall not exceed seventy-five cents each*," shall be five per cent. *ad valorem*: *Held*, that in estimating the "value," under this clause, of blankets manufactured at Leeds, and sent to Liverpool for exportation, the cost of transporting them to Liverpool, including the freight or carriage, must be taken into the account. *Hoffman v. Williams*, 69.

2. The charge of a specific duty upon an article in a particular form or vessel, is a charge upon the whole article, as described, including the vessel or material described as containing it. *Karthauss v. Frick*, 94.

3. The act of congress of 10th February 1820, has no connection with the tariff act of 1832, and cannot affect its construction. *Ibid.*

4. The tariff act of 1832, in imposing a specific duty upon salt of 10 cents per 56 pounds, did not intend that the sacks in which the salt is imported, should be subject to an additional *ad valorem* duty. *Ibid.*

5. The court cannot undertake to infer such an intention, merely because the relative value of the sacks, compared with the salt they contain, is much larger than that which the vessel or outside wrapper usually bears to the merchandise imported in it. *Ibid.*

## DUTIES ON IMPORTS.

6. In an action to recover duties paid under protest, upon hearth-rugs, under the act of 14 July 1832, it being admitted that worsted is made out of wool by combing, and thereby becomes a distinct article, well known in commerce under the denomination of "worsted," and that the hearth-rugs in question were made entirely of worsted, except that linen threads were used to sew together certain portions of them: *Held*, that the said rugs were not chargeable with duty as "manufactures of wool," or "of which wool is a component part," under that act. *Riggs v. Frick*, 100.

7. If such rugs were, at the time of the passage of the act of 2 March 1833, well known in commerce by the denomination of "worsted stuff goods," they were entitled to be admitted to entry, free from duty. *Ibid*.

8. But if not so then known, they were liable to the duty of fifteen per cent. *ad valorem*, imposed by the 25th clause of the second section of the act of 1832, as a non-enumerated article. *Ibid*.

9. The rugs, as worsted goods, were not liable to cash duties, but the importers were entitled to a credit of three and six months, as provided in the fifth section of the act of 1832. *Ibid*.

10. The eighth section of the act of 30 July 1846, which declares that, under no circumstances, shall the duty be assessed upon less than the invoice value, did not repeal the previous law (2 March 1799) which authorized allowances for deficiencies and damages incurred during the voyage; it applies to the *value* merely, and not to the *quantity* of the article imported. *Brune v. Marriott*, 132.

11. The effect of the sixteenth section of the act of 1842 was, wherever an *ad valorem* duty was imposed, to charge it only upon the amount of merchandise actually imported. *Ibid*.

12. In the absence of any official appraisement of the amount and value of the deficiency, the only rule of abatement approximating to exact justice between the parties, would seem to be—to estimate the dutiable value of the articles (sugar and molasses) lost by leakage, in the same manner and upon the same principles that the dutiable value of the amount mentioned in the invoice is ascertained, and to reduce the assessment accordingly, the *amount* of the deficiency being ascertained from the returns of the official weigher and gauger. *Ibid*.

13. A *pro rata* abatement is to be made also upon the amount of the incidental charges at the port of shipment, such as commissions, &c., and upon the value of the hogsheads in which the *sugar* and molasses are shipped (all of which enter into the amount upon which the duties are assessed). *Ibid*.

## ELECTION.

1. Whenever money or property is lawfully recovered or received by an executor or administrator, in his representative character, he holds it as assets of the estate, and is liable in that character to the party entitled to it. *Duffy v. Neale's Administrator*, 271.

## ELECTION.

2. If the decedent was not liable for the money in his lifetime, and his administrator, after his death, receive it in his representative character, and the receipt and acquittance of the administrator discharge the debtor, the party entitled to the money may, at his election, hold him responsible, either in his personal or representative character. *Ibid.*

3. But the decedent must have held the property, or chose in action, under a contract, express or implied, with the party entitled to the money, and must have been authorized to deal with it and dispose of it in his own name. *Ibid.*

4. In such case, for the purposes of justice, the law permits the party entitled to consider the contract as having been an absolute assignment, and to treat the other party as his assignee, who took the property as his own, and agreed to become debtor to him for the proceeds realized from it; or to regard the contract as one of agency only, in which the property or chose in action is held by the agent, not as his own, but merely as bailee for his principal, and in which he is authorized to receive the proceeds, not as money due to himself, but as money due to the principal, and placed in his hands, subject to the order and direction of his principal. *Ibid.*

5. Although, in such cases, either of the contracts above mentioned may have been the real one, yet both cannot exist at the same time, with reference to the same subject-matter, because they are inconsistent with each other. *Ibid.*

6. The party entitled may elect to consider either of said contracts the true one, but he cannot proceed upon both. *Ibid.*

7. If the party entitled to the money elect to proceed against the administrator in his representative capacity, and recover a judgment, he cannot afterwards proceed, either at law or in equity, against the administrator, in his individual capacity, or against his individual estate, if he be dead. *Ibid.*

## EQUITY.

## PRINCIPAL AND SURETY, 6-8.

1. The exercise of a power not warranted by law, by the head of a department, cannot create such an equity against the United States, as will be recognized and enforced in a court of justice. *Goldsborough v. United States*, 80.

2. In regard to equitable rights, the power of the courts of chancery of the United States is, under the constitution, to be regulated by the law of the English chancery. *Meade v. Beale*, 339.

3. But this rule applies to the *remedy*, not to the *right*; it is the *form* of the remedy for which the constitution provides; and if a complainant has no *right*, the circuit court, sitting as a court of chancery, has nothing to remedy in any form of proceeding. *Ibid.*

## EVIDENCE.

## WITNESSES.

1. The fact that a passenger is injured by the upsetting of a stage-coach, is *prima facie* evidence of negligence in the carrier. *Saltonstall v. Stockton*, 11.
2. The question of the competency of a witness is to be determined by the laws of the state in which the case is tried. *United States v. Dow*, 34.
3. When all the witnesses are equally trustworthy, it is not by the number that the court must be governed; but rather by the means of knowledge they respectively possessed. *Taylor v. Harwood*, 437.
4. New testimony introduced in an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the district court. *Ibid.*

## EXECUTION.

1. A *fiery facias* issued in the names of two plaintiffs, after one of them is dead, is irregular and defective; but such defect may be amended, under the authority given by the 32d section of the act of 1789, if the matter be regularly brought before the court. *Lane v. Beltzhoover*, 110.

## EXECUTORS AND ADMINISTRATORS.

## PRINCIPAL AND SURETY, 1.

1. Whenever money or property is lawfully recovered or received by an executor or administrator, in his representative character, he holds it as assets of the estate, and is liable in that character to the party entitled to it. *Duffy v. Neale's Administrator*, 271.
2. If the decedent was not liable for the money in his lifetime, and his administrator, after his death, receive it in his representative character, and the receipt and acquittance of the administrator discharge the debtor, the party entitled to the money may, at his election, hold him responsible, either in his personal or representative character. *Ibid.*
3. But the decedent must have held the property, or chose in action, under a contract, express or implied, with the party entitled to the money, and must have been authorized to deal with it and dispose of it in his own name. *Ibid.*
4. By the law of England and, it would seem, of Maryland also, before the act of 1843, an executor may sell or raise money on the property of the deceased, in the regular execution of his duty, and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. *Lowry v. Commercial and Farmers' Bank*, 310.
5. But if a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured. *Ibid.*

## EXECUTORS AND ADMINISTRATORS.

6. In the case of *Allender v. Riston*, the opinion of the court would seem to have been that, notwithstanding the act of 1798, sect. 3, an assignment by the executor, for his own debt, would be valid against the creditors of the estate, unless there were collusion with the executor; but the case was not decided on that point, nor does the opinion of the court apply to an assignment of property specifically bequeathed. *Ibid.*

## FIRE INSURANCE.

1. In an action on a policy of insurance, to recover for a loss to goods, sustained by fire: *Held*, that the plaintiff was not entitled to recover, if he designedly, and with a fraudulent intent, withheld or delayed to deliver to the defendant, the necessary information, invoices, documents and proofs, or any of them. *Betts v. Franklin Fire Insurance Co.*, 171.

2. Nor was he entitled to recover, if he was wilfully guilty of false swearing in his affidavit furnished to the defendant, or presented the affidavit of any other person, or made any statement to the defendant, knowing it to be false. *Ibid.*

3. But that the omission to furnish the defendant with such information and documents, or delay in presenting them, or any of them, was no bar to the plaintiff's recovery, if such omission or delay were occasioned by loss of the papers, or by oversight, mistake or accident, and without fraudulent intention. *Ibid.*

4. Nor was any error of fact, contained in the plaintiff's affidavit, or in any other affidavit furnished by him, a bar to his recovery, if he acted in good faith, and believed the said affidavits or other papers, to be true, when he furnished them to the defendant. *Ibid.*

## FORFEITURE.

PASSENGERS.

SLAVE TRADE.

## FRAUD.

CONSIDERATION, 3.

FIRE INSURANCE, 1-2.

SALE, 1-2.

1. Oakley advanced money, at New York, on bottomry, for the repairs of the schooner *Isabella* (afterwards the "*Rosamond*"), of Port au Prince; the bond was dated 16 November 1829, and payable sixty days after the arrival of the vessel at Port au Prince, where she arrived on the 12th of December 1829; the title to her, at the time of the bottomry, was, according to her papers, vested in Dupesne, a merchant of Port au Prince, father-in-law of R. A. Windsor, the principal of the firm of Windsor & Co. Oakley sent the bottomry-bond to Windsor & Co. for collection, supposing them to be the charterers; and they, on the 10th of January 1830, endorsed on the bond the following acquit-



## FRAUD.

tance: "We hereby acquit Messrs. L. Dupesne & Co., owners of the schooner *Isabella*, as well as the said schooner, collectively or individually, of all liability or responsibility that might arise from this bottomry-bond, which, being entrusted to us by Mr. Oakley, we now cancel and annul, acknowledging ourselves to be the sole debtors to Mr. Oakley of the amount of disbursements paid by him on the schooner in New York, the said amount being, according to agreement, entered to our own account." Prior to the execution of this acquittance, a letter, dated 31 December 1829, had been despatched by Windsor & Co., to Oakley, stating that *they* were the owners of the schooner, and that his advances on her account would be promptly remitted by them. Oakley, not knowing of the above acquittance, brought suit in the Haytien court, against Windsor & Co., and obtained judgment on the 14th September 1830, on an account, in which the amount of the bottomry-bond was included. On the 30th December 1830, Herwig (the claimant of the vessel) purchased her from Dupesne, who exhibited to him the bottomry-bond, with the acquittance of Windsor & Co. written upon it; at the time he made this purchase, Herwig was acquainted with the fact of the judgment recovered by Oakley against Windsor & Co., and that, notwithstanding this judgment, and the acquittance written on the bond, Oakley claimed his lien on the vessel under his bottomry-bond, as still subsisting. No evidence was offered by Herwig to prove that he paid full value for the schooner, and immediately after the purchase he changed her name to "*Rosamond*," and sent her to a port of the United States to which she had not been accustomed to trade. Windsor & Co. stopped payment in the month of September preceding the sale to Herwig. On a libel filed by Oakley, to enforce his bottomry-lien: *Held*, that the acquittance of Windsor & Co. was a fraud upon the libellant, and a mere nullity, and did not in any degree impair the security of the bottomry-bond. *Herwig v. Oakley*, 389.

2. The suit brought and judgment recovered by Oakley in Hayti, being in ignorance of the facts constituting the fraud, did not amount to a waiver of the bond. *Ibid*.

3. But it would have amounted to a waiver, if it had been done with a knowledge of all the facts. *Ibid*.

4. Herwig could not hold the vessel discharged from the lien of the bond, as he was a purchaser with notice of Oakley's claim. *Ibid*.

5. His opinion as to the validity of that claim, did not alter his predicament; he had notice that Oakley made the claim, and having this notice, he bought at his peril, and the property in his hands was bound to the same extent and in the same manner as it was in the hands of the person from whom he purchased. *Ibid*.

## FREIGHT.

1. The vessel, of which the libellant was master, was chartered to take a cargo of flour from City Point, in Virginia, to Rio Janeiro, and

## FREIGHT.

taking in a cargo of coffee at Rio, to proceed to Baltimore; the charterer was to pay \$1 25 per barrel on the flour, in full for the hire of the vessel for the round voyage; so much thereof as might be needed for expenses, was to be paid to the master at Rio, and the balance on the arrival of the vessel at Baltimore. The charterer obtained from L. G. (the claimant) large advances upon the flour, and endorsed the bills of lading (which were "to order") to L. G., who endorsed them to his agent at Rio, with directions to purchase coffee with the proceeds, to be shipped to him at Baltimore: the agents of L. G., at Rio, took possession of the flour, on its arrival, and shipped, by the same vessel, to Baltimore, one hundred and thirty bags of coffee, consigned to L. G.: on the arrival of the vessel at Baltimore, the charterer having meanwhile stopped payment, the coffee consigned to the claimant, was taken possession of, under these proceedings, to meet the owner's claim for the freight due by the charterer; the net proceeds of the sale of the flour at Rio did not cover the whole amount of the claimant's advances on it, and the consignment of coffee was insufficient to make up the deficit: *Held*, that if the coffee were regarded as the property of the charterer, and shipped by his agents, and the claim of L. G. nothing more than a lien upon it, it would be liable to the whole amount of the freight due under the charter-party. *Webb v. Anderson*, 504.

2. As between charterer and ship-owner, it is always implied, unless there be an express contract to the contrary, that the freight must be paid before the delivery of the cargo. *Ibid*.

3. If the interest which the claimant acquired in the flour was a mere lien which attached itself to the proceeds, and to the coffee purchased with the proceeds, then the lien for freight would be prior, and preferred to his. *Ibid*.

4. But the interest of L. G. (the claimant) in the coffee, was something more than a mere lien; it was his property, and the charterer had no right to the possession or control of it, nor to the proceeds, unless a surplus remained, after satisfying the amount to secure which the flour had been transferred to the claimant. *Ibid*.

5. The lien of the ship-owners upon the return cargo, under this charter-party, did not depend upon the funds with which it was purchased. *Ibid*.

6. The claimant was a mortgagee of the flour, and nothing more; but to the extent of his interest, his rights stand on the same ground as if he had been the purchaser; and to that extent he is to be considered the purchaser and owner of the flour, from the time of the assignment and delivery to him of the bills of lading. *Ibid*.

7. The claimant, however, purchased subject to existing claims, and whatever rights the ship-owners had, at that time, acquired under the charter-party, either to the outward or inward cargo, remained unchanged. *Ibid*.

8. The delivery of the flour to the agents of the claimant at Rio, was

## FREIGHT.

a delivery to the claimant, who therefore held it, by reason of such delivery to him, discharged of any lien for freight, and consequently, when the flour was sold, there could be no lien upon the proceeds. *Ibid.*

9. Under these circumstances, the coffee was purchased with the claimant's money, and shipped as his property at the ordinary freight. *Ibid.*

10. If the bill of lading signed by the master was in violation of his duty, or inconsistent with the charter-party, it would not impair the rights of the ship-owners. *Ibid.*

11. But this charter-party does not contain the usual clause by which the owner binds the ship, and the charterer binds the cargo to the performance of all the covenants in the charter-party; and upon general principles of law, the merchandise is bound for its own transportation only, and its liability cannot be extended further, except by stipulations in the charter-party under which the voyage was performed. *Ibid.*

## HABEAS CORPUS.

1. On the 25th May 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under orders of a major-general of the United States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th May 1861, a writ of *habeas corpus* was issued by the Chief Justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May 1861; on the last-mentioned day, the writ was returned served, and the officer to whom it was directed declined to produce the petitioner, giving as his excuse the following reasons: 1. That the petitioner was arrested by the orders of the major-general commanding in Pennsylvania, upon the charge of treason, in being "publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government:" 2. That he (the officer having the petitioner in custody) was duly authorized by the President of the United States, in such cases, to suspend the writ of *habeas corpus* for the public safety: *Held*, that petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following: 1. That the President, under the constitution of the United States, cannot suspend the privilege of the writ of *habeas corpus*, nor authorize a military officer to do it: 2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately

## HABEAS CORPUS.

to the civil authority, to be dealt with according to law. *Ex parte Merryman*, 246.

2. Under the constitution of the United States, congress is the only power which can authorize a suspension of the privilege of the writ. *Ibid.*

## INDICTMENT.

1. An indictment which states that the prisoner, "late of the district of Maryland, mariner, on the 31st day of October 1839, *then and there*, being on board a certain brig, called, &c., *on the high seas, on the Atlantic Ocean in latitude 33°*, out of the jurisdiction of any particular state, and within the jurisdiction of the United States," \* \* "did, *then and there*, commit," &c., is bad for repugnancy; and no judgment will be rendered thereon. *United States v. Dow*, 34.

2. The words *then and there*, mean "at the time and place aforesaid," and in this case refer as to *time*, to the 31st day of October 1839, and as to the *place*, to the district of Maryland; and this allegation (which is a substantive one) is repugnant to the subsequent allegation, that the offence was committed on the high seas, "*out of the jurisdiction of any particular state.*" *Ibid.*

3. The court cannot reject any material allegation in an indictment or information, which is sensible and consistent in the place where it occurs, and is not repugnant to any *antecedent* matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected. *Ibid.*

## INSOLVENCY.

1. L. confessed judgment on two promissory notes, one of which was given upon a usurious and the other upon a gambling consideration, and afterwards became insolvent, and a trustee of his estate was appointed under the insolvent laws of Maryland; the trustee filed a bill for relief from an execution issued upon the judgment, and called on the judgment-creditor to state the true consideration of said notes; on demurrer to the prayer for such discovery: *Held*, that the principle upon which the court grants relief after a voluntary payment of money must also entitle the party to relief after a voluntary confession of judgment. *Thomas v. Watson*, 297.

2. The omission of L. to defend himself in the action at law, is no bar to the relief asked for by the complainant; these questions not having been raised in that suit, nor yet been decided in any court. *Ibid.*

3. The rights and defences possessed by L. at the time of his release, are transferred to his trustee; and the complainant may now make the same defences, at law or in equity, against these claims, and against the judgment upon them, which L. could have made, if he had never become insolvent. *Ibid.*

## INSTALMENTS.

1. Where a defendant contracted for the purchase of a house, and agreed to pay the purchase-money in instalments, at specified periods, but afterwards repudiated the contract, in a suit brought by the vendor for the breach: *Held*, that no action could be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before the suit was instituted. *Greenway v. Gaither*, 227.

2. A notification by the defendant, that he would not fulfil his contract, did not authorize an immediate suit on it, because none of the payments to be made by him were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which a suit at law could be immediately brought. *Ibid*.

## INSURANCE.

## FIRE INSURANCE.

1. In order to entitle the plaintiff to recover for a loss, on a policy of insurance on his vessel, she must, at the time the policy attached, have been seaworthy for such a voyage as she was engaged in at the time of the disaster, and have been lost by reason of one of the perils insured against in the policy. *Adderly v. American Mutual Insurance Company*, 126.

2. She is presumed to have been seaworthy at that time, unless the contrary is proved by the testimony; and the burden of proof of unseaworthiness is on the defendant. *Ibid*.

3. If there was a leak in the vessel, at the time of sailing on the voyage insured for, of such a nature, that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak, before proceeding on the voyage, and the disaster was occasioned by his omission to do so, and would not otherwise have happened, there can be no recovery for the loss. *Ibid*.

4. But if the character of the leak were such, that a master of competent skill and judgment might reasonably have supposed that she was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account, omitted to examine and repair, then such omission to examine and repair will be no bar to the recovery. *Ibid*.

5. In an action on a policy of insurance, to recover, as for a total loss, the amount insured upon the freight on jerked beef, where it appeared that the vessel in which it was shipped was obliged to put into a port of distress, with the loss of a large portion of the beef, and that the balance was sold there, by an order of court, at a loss, in order to avoid further loss, and in consequence of the supposed inability of the vessel to proceed on her voyage: *Held*, that there was not a total loss, when the beef was unladen at the port of distress, because a part of it still remained in specie, and had not been totally destroyed by the disaster. *Hugg v. Augusta Insurance and Banking Co.*, 159.

6. There could be no recovery for a total loss, if the vessel could

## INSURANCE.

have been repaired within a reasonable time, and at a reasonable expense; and there was reasonable ground for believing that a portion of the beef might, by that means, be transported to the port of destination, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef. *Ibid.*

7. If the vessel could not have been repaired in a reasonable time, and at a reasonable expense, at the port of distress, yet, if another vessel or vessels could have been procured upon reasonable terms, which could have carried the beef to the port of destination, there could be no such recovery for a total loss. *Ibid.*

8. A sale made under such circumstances, by order of court, upon the application of the master, will not entitle the plaintiff to recover for a total loss, unless the loss was at that time total, independently of such sale. *Ibid.*

9. But the loss was total, if the repairs would have produced such a delay as would, in all probability, have occasioned a destruction of the remaining portion of the cargo, before it could arrive at its port of destination, or that it would have become so damaged, as to endanger the health of the crew on the voyage, from the noxious effluvia arising from it. *Ibid.*

10. It is also total, if the expense of making the repairs, at the port of distress, so as to fit the vessel for carrying cargo, would have exceeded the amount of freight which would have been earned, by completing the voyage, and delivering at the port of destination, the remainder of the cargo; provided another vessel could not have been procured, upon terms that would have enabled the master to save some portion of the freight, for the benefit of the underwriters. *Ibid.*

11. But the plaintiff must show the existence of these obstacles, in order to enable him to recover for a total loss. *Ibid.*

## INTEREST.

1. In Maryland, where the sum due has never been liquidated, and is in dispute between the parties, the practice is, to leave to the jury, the question of the allowance of interest. *Hugg v. Augusta Insurance and Banking Co.*, 159.

2. The constitution of Maryland, art. 3, sect. 69, declares, "that the rate of interest in this state, shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." *Held*, that under this provision, a contract by which a higher rate of interest than six per cent. is taken or demanded, is void, not only for the excess, but for the whole amount; and cannot be enforced in a court of justice. *Dill v. Ellicott*, 233.

3. It is true, no penalty or forfeiture is incurred by reason of the usurious contract, until the legislature shall prescribe it; but the incapacity to maintain an action upon such contract is no forfeiture or

## INTEREST.

*penalty*, for no right of action is acquired under it, and therefore, there is nothing to forfeit. *Ibid.*

## JUDGMENT.

1. The record of the acquittal and discharge of a vessel, on a libel for her condemnation under the act of 10 May 1800, for being engaged in the slave-trade, is not evidence of her not being an American vessel, in a subsequent suit for a penalty, for the non-surrender of her certificate of registry, under the act of 31 December 1792. *Allen v. United States*, 112.

2. The rule that the sentence of a court of admiralty, on a proceeding *in rem*, is conclusive on everybody, is confined to civil cases; it has no application to criminal proceedings, nor to suits for penalties. *Ibid.*

## JURISDICTION.

## ADMIRALTY, 1, 14.

1. The grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that such jurisdiction is to be exclusive. *Gittings v. Crawford*, 1.

2. If a circuit court, in equity, be able to do complete justice to the plaintiff, without regard to the rights of some of the defendants against others, it has no jurisdiction to adjust the equities between co-defendants, who are all citizens of the state in which it sits. *Lowry v. Commercial and Farmers' Bank*, 310.

3. If the district court has not jurisdiction independently of the consent of the parties, that consent cannot confer it. *McKim v. Kelsey*, 502.

## JURY.

## CHALLENGE.

1. If there be the slightest evidence conducing to prove the fact, the question must be left to the jury; even if there be some doubt whether there be any competent and legal evidence of the fact, the court will not withdraw the question altogether from the jury, they have no right to suppose that the jury will find a verdict upon slight and insufficient testimony, or without any testimony to warrant it. *Saltonstall v. Stockton*, 11.

2. The act of 24 September 1789, in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be summoned. The circuit courts are bound to follow the laws of the respective states in which they are held, in the mode of forming the juries, and in determining upon their qualifications; but the laws of the several states do not regulate the courts of the United States in the number to be summoned; upon this subject, they are governed by the rules of the common law. *United States v. Dow*, 34.

## LAW AND FACT.

1. Questions as to negligence, and reasonable skill and care, in every kind of business, are necessarily questions of fact, and belong to the jury; the court can do nothing more than give the rule by which they are to be tried. *Saltonstall v. Stockton*, 11.

2. It is for the jury to determine, upon the whole evidence, whether the person obtaining a copyright for a musical composition, was the author of it or not. *Reed v. Carusi*, 72.

## LEX LOCI CONTRACTUS.

## CONFLICT OF LAWS.

## LIENS.

## FREIGHT, 1-11.

1. S. & T., at New York, were agents and consignees of the brig Camilla, owned in Boston: at the request of the master of the Camilla, S. & T. gave their written order on P., D. & Co., for certain copper required to repair the vessel; the order was delivered by a clerk of S. & T.; in the order no mention was made of the vessel or her owners, and the copper was furnished by P., D. & Co., and charged on their books to S. & T., to whom they also presented the account for the copper, and whose negotiable note they took, payable in six months: S. & T. charged the Camilla, on their books, with the amount of the note, deducting three per cent. therefrom, to make it a cash transaction. The Camilla sailed from New York on her voyage: before the note fell due, the owner of the vessel, and also S. & T. became insolvent, and this libel was filed by P., D. & Co., against the vessel, whilst lying at Baltimore, to recover the amount due for the copper: *Held*, that *primâ facie*, the necessary repairs furnished by material men, to a foreign ship, are a lien on the vessel. *Phelps v. The Camilla*, 400.

2. The six months' credit given would not prevent the lien from attaching. *Ibid*.

3. But if the credit was given to the owner or any one else, and not to the vessel, then there was no lien. *Ibid*.

4. Where the owner of a vessel has an agent residing at the place where the repairs are being made, who purchases the materials in his own name, and gives his personal undertaking to pay the price, there will be no lien on the vessel, unless specially given. *Ibid*.

5. In such case, the transaction becomes an ordinary one between buyer and seller, and although the materials are afterwards applied to the use of the vessel, that circumstance will not create a lien upon her. *Ibid*.

6. The materials must be supplied for the vessel, and upon her credit, in order to create a lien. *Ibid*.

7. Even if the materials had been originally charged to the vessel and her owner, the lien thus acquired would have been waived, by the material men afterwards taking the individual note of the agents of the owner. *Ibid*.



## LIENS.

8. If the party do not chose to rely on the contract which the maritime law implies in such cases, but take an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied. *Ibid.*

9. If he take a note or bill of exchange, or any other personal engagement for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulate that the liability of the vessel shall still continue. *Ibid.*

10. In general, the party for whom a vessel is built, under contract with a shipwright, is not liable for the debts contracted by the shipwright on account of the vessel; in such cases, the contracts for work or for materials are usually made by the shipwright for himself and on his own account, in order to fulfil his agreement with the party for whom the ship is built. *Leslie v. Glass*, 422.

11. Where both parties reside in Maryland, and the ship is built there, the mechanics and material men have no lien upon her. *Ibid.*

12. Where the party for whom the vessel is built pays the money to the shipwright, according to his contract, he is entitled to the delivery of the vessel, and holds her free and discharged from any claim against the vessel, or against himself personally, on account of work done or materials furnished for the shipwright. *Ibid.*

13. On a libel against a vessel, owned by residents of New York, and against her owners, for materials furnished such vessel at the city of Baltimore, partly before, and partly after she came into their possession: *Held*, that as the vessel was previously owned by a resident of Baltimore, the materials furnished her, while so owned, were no lien. *Leef v. Goodwin*, 460.

14. But materials furnished after the change of ownership, at the request of the master and former owner, under whose charge the vessel was fitted out, were a lien upon her, unless it be shown that they were furnished on credit of the master; and the burden of proof as to this fact is on the libellants. *Ibid.*

15. The port where a vessel is enrolled and licensed is her home-port; the circumstance that her owner or charterer is a citizen of another state will not make her a foreign vessel, and supplies furnished at that port create no lien. *Pickell v. The Loper*, 500.

16. A vessel whose voyages are confined within the limits of the district where she is enrolled and licensed, although she may connect with vessels or vehicles by which the line of communication is extended to the port of another state, cannot be considered as engaged upon foreign voyages: the furnishing of necessaries to enable her to perform such voyages, is not a maritime contract, it has no connection with commerce upon the high seas, and does not fall within the principles and reasons upon which the maritime law implies a lien. *Ibid.*

## LIMITATION.

COPYRIGHT, 8-9.

1. Where a suit was docketed, by consent, in November, "as of April Term" preceding: *Held*, that so far as limitation is concerned, the suit will be taken as brought on the first day of the April Term. *Reed v. Carusi*, 72.

2. In order to remove the bar of the statute of limitations, it is necessary that there should either be an express promise to pay, or an admission of the debt, in such terms as imply that the party is liable and willing to pay. *Georgia Insurance and Trust Co. v. Ellicott*, 180.

3. Where a person applies for the benefit of the insolvent laws, the list of debts due by him, required to be filed with his application, is not such admission of indebtedness, as can be held to imply that he is willing to pay such indebtedness in full. *Ibid*.

4. On the contrary, the very object of the petition is to be discharged from his debts without payment in full. *Ibid*.

## MALAY.

WITNESSES, 3.

## MALICIOUS PROSECUTION.

1. In an action to recover damages sustained by an alleged unfounded and malicious suit in equity, the plaintiff must show, not only a want of probable cause, but also a malicious intent on the part of the complainants in that suit. *Burnap v. Albert*, 244.

2. The want of probable cause would be evidence of malice, to be weighed by the jury in connection with the other testimony in the cause. *Ibid*.

3. Where, in the progress of a cause, a writ of *ne exeat* was obtained against the defendant, and he was imprisoned thereunder, without probable cause, and through malice on the part of the counsel of the plaintiffs in that action, they will not be held responsible for such acts of their counsel, unless directed by them, nor for the motives by which they were governed. *Ibid*.

4. But if such plaintiffs afterwards refused to stay the proceedings, or discharge the party from imprisonment, from the desire to obtain thereby, unjustly, any pecuniary advantage to themselves, and knew or believed, at the time of their refusal, that such proceedings and imprisonment had been procured maliciously, and without any probable cause, then they would be liable. *Ibid*.

5. If, however, in refusing to interfere, they were actuated by honest motives, seeking and desiring, by legal means, to recover money which they believed to be due to them, and were guided by their counsel, whom they believed to be trustworthy, then they would not be liable. *Ibid*.

## MARINERS.

SEAMEN.

## MARITIME LIENS.

## LIENS.

## MASTERS OF VESSELS.

1. The bond given by the master of a vessel, under the 1st section of the act 28 February 1803, bound to a foreign port, conditioned for the return of the crew to the United States, does not embrace the case of a vessel sold in a foreign port, and which does not return to the United States. *Montell v. United States*, 24.

2. It does not extend to cases where the seaman is lawfully separated from the ship, or is separated from her without the fault of the master or owner. *Ibid.*

3. It applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continue subject to the lawful authority of the master, and where it was in his power to bring them home. *Ibid.*

4. The master has a right to contract for the employment of the vessel, under circumstances of necessity, and the owners will be bound by it; but this right is derived from the maritime code, which is founded on the general usages and convenience of trade, and which has been adopted, to a certain extent, by all commercial nations. *Naylor v. Baltzell*, 55.

5. Where a vessel is injured by dangers of the seas, and is obliged to seek a port of distress, where she is found to be unable to proceed on her voyage, and the cargo is landed, the master becomes the agent of the cargo as well as the ship, and in that character, it is his duty to deal with the cargo, as a prudent and discreet owner would have done, if he had been on the spot at the time: he may tranship it, and earn freight for his owners: if his own ship can be repaired in a reasonable time, he has a right to retain it until his own ship is ready, and, if necessary, may sell a part of the cargo, or hypothecate the whole, in order to obtain money for the necessary expenses of repairs; or he may abandon the voyage, and notify the owners of the cargo of the disaster, and await their orders as to its future disposition. *Ibid.*

6. As to the ship, the master may, in a foreign port, contract for repairs and supplies, and thereby bind the owners to the value of the ship and freight; or he may hypothecate the ship and freight, and thereby create a direct lien upon them for the security. *Ibid.*

7. The authority of the master is limited to objects connected with the voyage, and if he transcend the prescribed limits, his acts become, in legal contemplation, mere nullities: and it is incumbent on the creditor to prove the actual existence of the necessity of those things which give rise to his demand. *Ibid.*

8. The master has the power to pledge the ship and freight, only in cases of necessity—that is to say, where it is necessary for the interest of the owner, or there is reasonable ground to believe it will be for his interest; and the lender on bottomry is bound to show the existence of

## MASTERS OF VESSELS.

this necessity, otherwise, he is not entitled to recover, even against the ship and freight. *Ibid.*

9. Because it may sometimes be for the interest of the cargo to have the vessel repaired, the power is given to the master to sell a part, or hypothecate the whole, if necessary, to raise funds for that purpose; but the lender must show that the necessity existed, otherwise, he is not entitled to recover on his bond. *Ibid.*

## MILITARY POWER.

1. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. *Ex parte Merryman*, 246.

## MOBS.

## MUNICIPAL CORPORATIONS.

## MUNICIPAL CORPORATIONS.

1. In an action against the Mayor and City Council of Baltimore, under a law of Maryland of 1835, ch. 137, making any county, incorporated town, &c., in which a riot occurs, liable for injuries to or destruction of property, occasioned thereby; with a proviso, "that no such liability shall be incurred by such county, &c., unless the authorities thereof shall have had good reason to believe that such riot, &c., was about to take place, or, having taken place, should have had notice of the same, in time to prevent said injury, &c., either by their own police, or with the aid of the citizens of such county, &c.; it being the intention of this act that no such liability shall be devolved upon such county, &c., unless the authorities thereof, having notice, have also the ability, of themselves, or with their own citizens, to prevent such injury; and provided further, that in no case shall indemnity be received, where it shall be satisfactorily proved that the civil authorities and citizens of such county, &c., when called on by the civil authorities thereof, have used all reasonable diligence, and all the powers entrusted to them, for the prevention or suppression of such riotous or unlawful assemblages:" *Held*, that in order to entitle the plaintiff to recover, it must be shown, by the evidence, that the property was destroyed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority. *Duffy v. Mayor and City Council of Baltimore*, 200.

2. It must appear also, that the city authorities had reasonable grounds for believing that such an assemblage, too strong to be resisted without their aid, had taken place, or was about to take place, and did not use reasonable diligence to suppress or prevent it. *Ibid.*

3. If the property was destroyed by a tumultuous or riotous meeting, the corporation is not responsible, if diligent inquiry was made, after

## MUNICIPAL CORPORATIONS.

notice that danger was apprehended, and reasonable precautions taken by the civil authorities to guard against such a riotous and tumultuous assemblage. *Ibid.*

4. Nor are they answerable, if the injury was done upon a sudden excitement, which the civil authorities had not good reason to apprehend, or, from the suddenness, had not time to prevent. *Ibid.*

5. The city authorities were not bound to place officers or guards to prevent trespasses and depredations, and are not liable to pay for any destruction, unless committed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority, and which tumultuous assemblage the civil authorities had reasonable ground to believe would take place, for the purpose of destroying the property *Ibid.*

6. Even if it were proved that the property destroyed was so dilapidated as to be a nuisance, and dangerous to enter, this would be no defence to such action, as it could not be lawfully abated by a riotous and tumultuous assemblage. *Ibid.*

7. Where the Mayor and City Council of Baltimore were sued for damages sustained by the plaintiff, in falling into an uncovered drain, across one of the defendant's streets: *Held*, that the city authorities were the exclusive judges of the time, place and manner in which the streets should be opened, graded, paved and made highways. *Hughes v. Mayor and City Council of Baltimore*, 243.

8. That the omission of the city to grade and improve Canal street, at the point where the accident happened, and to place a rail on the side, or to cover it over, so as to make it a thoroughfare for public travel, was not, of itself, such negligence as would support the action. *Ibid.*

## NAVIGATION.

## COLLISION.

1. The rule, that when two vessels are meeting in opposite directions, each one shall port her helm, so as to pass each other on the larboard side, applies only to cases where both are sailing vessels, or both are steamboats, not to cases where one is a steamboat and the other navigated only by sails. *Haney v. The Louisiana*, 602.

2. In the latter case, it is the duty of the sailing vessel to keep steadily on her course, and the duty of the steamer to get out of her way, passing either on the starboard or larboard side, as may be most convenient to her. *Ibid.*

3. A steamboat carrying the mail is bound by the same laws and rules of navigation that govern any other steamer which is engaged in the transportation of passengers or merchandise and without any mail; no contract with the post-office department, or any other department of the government, can dispense with any of the duties to which steamboats, navigating the same waters, are subject. *Ibid.*

4. The strictest supervision should always be exercised by courts of

## NAVIGATION.

justice over steam-vessels navigating our bays and rivers, and the utmost vigilance and caution constantly exacted from them, when approaching sailing vessels. *Ibid.*

## NAVY.

## PURSERS.

## NAVY-AGENTS.

1. A navy-agent is not entitled to compensation beyond his salary, as fixed by law, for any extra services, although such services may be out of the district for which he is appointed, and may more properly appertain to the duties of another navy-agent, or even to an officer of the government filling an office of a different character; his salary is the only compensation for services required of him, and performed by him, if he hold no other office or appointment. *United States v. White*, 152.

2. He is not entitled to an allowance for the hire of a porter, unless such allowance be made by a general regulation of the secretary. *Ibid.*

3. Nor is he entitled to an allowance for services rendered as pension-agent. *Ibid.*

4. Where the secretary of the navy appointed the navy-agent at Baltimore, acting purser for the naval school at Annapolis: *Held*, that he had the right to make such appointment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed; and that the court was bound to presume, in this instance, that the power was exercised under circumstances that justified the appointment, and that such navy-agent would be entitled to the salary allowed by law to pursers. *Ibid.*

5. The circumstance that he held the office of navy-agent, at the same time, can make no difference; there is no law which prohibits a person from holding two offices at the same time. In the absence of any legal provision to the contrary, this appointment was valid; although, as a matter of policy, it would be highly exceptionable, in most cases, as a permanent arrangement. *Ibid.*

6. A navy-agent is entitled to office rent and clerk hire, and to engage them by the quarter; if he is dismissed from office, before the end of the quarter, he will be allowed for the whole quarter. *Ibid.*

## NEGLIGENCE.

## COLLISION, 1, 3-9.

## MUNICIPAL CORPORATIONS, 8.

1. Where plaintiff sued the proprietors of a line of stage-coaches for damages sustained by his wife, through the upsetting of one of their coaches: *Held*, that the plaintiff having proved that the carriage was upset and his wife injured, it was incumbent on the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver. *Saltonstall v. Stockton*, 11.

2. Every one that undertakes the business of a carrier of persons is

## NEGLIGENCE.

bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care, the traveller can be carried in safety; when, therefore, a passenger is injured, the presumption is that it has been occasioned by negligence. *Ibid.*

3. Justice, as well as the principles of evidence adopted in analogous cases, require, that any disaster by which a passenger suffers, should be *prima facie* evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary. *Ibid.*

4. Questions as to negligence, and reasonable skill and care, in every kind of business, are necessarily questions of fact, and belong to the jury; the court can do nothing more than give the rule by which they are to be tried. *Ibid.*

5. Although a man commit an unlawful act by digging a ditch or placing any other obstruction in a public highway, or by driving at a dangerous speed through a crowded street, and an individual be injured by it, the injured party cannot maintain an action, if it appear that he heedlessly and negligently came within reach of the danger, and did not use reasonable care to avoid it. *Ibid.*

6. But if a man unlawfully place another in a situation which compels him to undergo one of two hazards, and force him to choose, upon the instant, between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted. *Ibid.*

## NEGROES.

WITNESSES.

## NOTICE.

BANKS, 7, 10.

FRAUD, 4-5.

1. A *bonâ fide* transferee of bank-stock, to whom a new certificate is issued, is not affected with notice that his assignor, in making the transfer, was guilty of a breach of trust. *Lowry v. Commercial and Farmers' Bank*, 310.

2. But the bank which permits the transfer to be made by an executor, in violation of his trust, is affected with notice, and is liable for the dividends on the stock to which the parties are entitled under the will. *Ibid.*

## PASSENGERS.

1. The second section of the passenger act of 1819, is repealed by the tenth section of the act of 17th May 1848. *United States v. The Anna*, 549.

2. The tenth section of the act of 1848, in repealing the first section of the act of 1819, regulating the number of passengers, repealed all other parts of the law which inflicted penalties and forfeitures for breaches of the rule thereby established. *Ibid.*

## PASSENGERS.

3. The act of 1848 designed to repeal altogether the rule of apportionment of passengers, *by tonnage*, and to establish that provided by the act of 22d February 1847, as the only one by which the ship-owner was to be governed. *Ibid.*

4. The act of 22d February 1847, § 1, provides that, if the master of a vessel shall take on board, at a foreign port or place, a greater number of passengers, in proportion to the space appropriated for their use, than is therein specified, *with intent to bring such passengers to the United States*, and shall leave such port or place with the same, *and bring the same, or any number thereof*, within the jurisdiction of the United States, the master shall be deemed guilty of a misdemeanor, and fined fifty dollars, and may be imprisoned for a term not exceeding one year. The proportion prescribed by this section is, one passenger for every fourteen clear, superficial feet on the lower deck or platform; this space to be unoccupied by stores or other goods not being the personal luggage of such passengers; if the vessel is to pass through the tropics, the proportion is required to be twenty superficial feet, instead of fourteen. The second section subjects the vessel to forfeiture, in case the passengers "*so taken on board and brought into the United States*," shall exceed, by twenty, the number limited in the first section: *Held*, that the words "*so taken on board and brought into the United States*," refer to the whole provisions of the preceding section; they refer to the entire transaction there described, to the *taking on board* the forbidden number, as well as to the bringing them, *or any number of them*, into the United States. *Ibid.*

5. The taking on board, the intent at the time, and the bringing into the United States, are all constituent parts of the offence; it is consummated by the entry of the vessel into one of our ports, with any portion of the passengers on board, who have been exposed to the maladies and diseases incident to an overcrowded ship on such a voyage. If congress had intended to make the offence depend upon the number brought in, and that the number taken on board should not constitute a part of it, then the words "*so taken on board*" ought to have been omitted. *Ibid.*

6. The vessel is forfeited, if, when she left her European port for the United States, with one hundred and eighty-five passengers, the space occupied by them was not in the proportion of fourteen superficial feet to each passenger; and she is equally liable to forfeiture, if that proportion of the space was diminished at any time during the voyage, unless it was necessary, for a time, by the dangers of the sea. *Ibid.*

7. The eighth section of the act of 17th May 1848, does not repeal or modify any of the regulations of the act of 1847. *Ibid.*

8. The two acts (1847 and 1848) relate to the same subject-matter, are intended to accomplish the same object, and must be construed together; the eighth section of the act of 1848, when it speaks of the number of passengers to be taken on board and brought into the United States, refers to the numbers provided for in the act of 1847, and makes no new provision on that subject. *Ibid.*



## PASSENGERS.

9. A measurement of the vessel, and a statement placed on the files of the custom-house, specifying the number of passengers she is entitled to transport, is not conclusive upon the government, as evidence of the capacity of the vessel. *Ibid.*

10. It is the duty of the ship-owners to know how many they can legally transport; and if the fact be disputed, it is for the judiciary to decide upon the whole testimony. *Ibid.*

11. The question of forfeiture or not must be determined by the actual capacity of the surface appropriated to the use of the passengers. *Ibid.*

12. Where the space occupied by certain boxes on the berth-deck of a passenger vessel, was lawfully so occupied, if the boxes contained luggage belonging to the passengers, and was unlawfully so occupied, if they did not, it is incumbent on the United States, in a proceeding for the forfeiture of the vessel, to show what was the contents of such boxes, in order that it may be known whether the offence operating the forfeiture has been committed. *Ibid.*

13. The act of congress regulating the mode of transportation, is intended, not only for the protection or convenience of the passengers, but also to guard our own cities from disease, and from the burden of supporting a multitude of persons brought to our shores with their health broken on the voyage, by overcrowding them in the ship, or feeding them with unwholesome food; and when the law has regulated the manner of transportation, and prescribed the proportion which the number of passengers shall bear to the space appropriated to their use, neither their assent nor request, nor their supposed convenience, will justify the master in violating the provisions of the statute. *Ibid.*

14. In a proceeding for the forfeiture of a vessel under the passenger acts, a cause of forfeiture, not made a charge against the master and ship-owners, which is not one of the grounds upon which the forfeiture is claimed, and which was not noticed in the district court, is not properly before the circuit court, on appeal. *Ibid.*

## PATENTS.

1. A patent is *prima facie* evidence that the patentee is the inventor of the improvement described, and casts on persons infringing it, the burden of proving that such improvement was not the invention of the patentee, or that it was in public use before he applied for a patent. *Knight v. Baltimore and Ohio Railroad Co.*, 106.

2. The patentee cannot recover damages for the infringement of his patent, unless the jury find his improvement to be useful, and of some value. *Ibid.*

3. The original patent may be surrendered, and a corrected one taken out, for the purpose of giving a more perfect description of the invention intended to be claimed in the original patent, or for the purpose of narrowing the claim, so as to leave out parts of the machinery claimed

## PATENTS.

as new in the first patent, and afterwards found to be the invention of others: provided, the error arose from inadvertence or mistake, and was attempted to be corrected within a reasonable time after its discovery. *Ibid.*

4. The improvement intended to be described in the re-issued patent must, in principle and mode of operation, be substantially the same with the one intended to be described in the original patent. *Ibid.*

5. It is not necessary to include, in the re-issued patent, all of the improvements claimed by the patentee, and to which he may have been actually entitled under the original patent. *Ibid.*

6. In an action for the infringement of a patent, brought by one patentee against another, the validity of the defendant's patent is not in question. The question is, whether the machine made by the defendant, in the manner described in his specification, is an infringement of the plaintiff's patent; for although the defendant's patent may be invalid and void, yet he is not liable to the plaintiff, unless the machine constructed by him infringes upon the right secured to the plaintiff. *Larabee v. Cortlan*, 180.

7. Where, in an action for the infringement of the plaintiff's patent for a shower-bath, it appeared, that substantial parts of the combination claimed by the plaintiff as his invention, were not used by the defendant; and that the combination of a movable reservoir, with a jet-bath, in the machine of the latter, differed materially, in several of its component parts, from that of the former, and also in the manner of their adjustment and arrangement in the machine; and that his bath differed also in the manner in which the shower was delivered and administered to the bather; and that although the same end was accomplished, it was not accomplished by the same means and by the same combination: *Held*, that there was no evidence of an infringement, by the defendant, of the rights secured to the plaintiff by his patent. *Ibid.*

8. On the 27th of December 1828, W., of the state of New York, obtained a patent for a machine of which he was the inventor, giving him the exclusive right to use the invention for fourteen years from the date of the patent, and no longer. On the 28th of November 1829, in consideration of the assignment to him of a rival patent, W. assigned to T. H. & T., and their assigns, all his right in said patent, for certain places, amongst others, for all the state of Maryland, except the part west of the Blue Ridge, "for the term of fourteen years from the date of the patent;" and by the deed of assignment, it was agreed, "that any improvement in either of the patents mutually assigned, in the machinery, or any alteration or renewal of the same, shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts, as therein designated." W., the patentee, afterwards died, and on the 16th of November 1842, his administrator obtained a renewal and extension of the patent, under the act of 4th July 1836, for the term of seven years from the expira-

## PATENTS.

tion of the original patent, and on the 9th of August 1843, assigned to J. G. W. his interest in the patent so renewed, for all the state of Maryland east of the Blue Ridge. On a bill filed by J. G. W. against the assignee of T. H. & T., claiming the exclusive right to use said machine, within said limits, during the term for which the patent was renewed: *Held*, that the act of 4th July 1836 applied to patents granted before its passage, as well as to those afterwards issued, and consequently, embraced the patent in question. *Wilson v. Turner*, 278.

9. This law clearly intended that the assignees or grantees of the patentee should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years; for it provides, in express terms, that the benefit of the renewal shall extend to them. *Ibid*.

10. The object of this clause in the act is, to preserve the contract, in the sense in which both parties understood and intended it, at the time it was made, and to secure to the purchaser the right which he intended to buy, and which the patentee must have intended to sell. *Ibid*.

11. The legislature intended to guard the party who had purchased from the patentee, the right to use his invention until the expiration of his exclusive privilege, from the necessity of purchasing it again; and when they were giving the patentee a new privilege, and one which he had no legal right to demand, they had a right to annex to it such conditions and limitations as, in their judgment, justice required. *Ibid*.

12. The law meant to provide that assignees and grantees should share with the patentee the benefit of the renewal, according to the interests which they respectively acquired in the thing patented, within particular districts of country, for their own individual use. *Ibid*.

13. Under the covenant contained in the deed of the 28th November 1829, each assignee, in his respective district, was to have precisely the same rights and benefits as the patentee himself had, or might afterwards obtain, so far as concerned these inventions; and if, by a subsequent act of congress, advantages were given to the patentee which he did not at that time possess, and which were not, therefore, in the contemplation of the parties, yet, according to the spirit and meaning of the covenant, the assignee had a right to stand in the place of the patentee, in his district, in respect to the new privilege as well as the old; and it would be against equity and conscience, to allow him to use a privilege afterwards unexpectedly gained, in order to defeat his own contract, in a manner obviously inconsistent with the intention of the parties. *Ibid*.

14. A case of this description is not one in which a court of equity is bound to lend its aid, even if the party had a right at law, upon the technical construction of the covenant; but the word *renewal* is broad enough to embrace not only renewals then authorized by law, but renewals that might afterwards be provided for, and this construction of the word conforms in every respect to the scope and spirit of the agree-

## PATENTS.

ment, and carries into effect the evident intention and design of the parties, at the time they made it, and is the only construction which will do equal justice to both. *Ibid.*

15. A combination in machinery is patentable, if the combination be new, although the elements which compose it may be old, provided it was invented by the patentee, and is not the mere effort of ordinary mechanical skill, putting together known powers and combinations to produce the result. *Crosby v. Lapouraille*, 374.

## PENAL DUTIES.

1. Where the penalty of twenty per cent. is imposed on an importation, because of the excess of the market value, over the invoiced value, which is paid under protest, and such importation, having only been entered for warehousing, is afterwards exported elsewhere for sale: *Held*, that the importer was not, for this reason, entitled to recover back the amount of the penalty so paid. *Bartlett v. Kane*, 186.

## PENALTIES.

STEAMBOATS, 4-5.

1. The penalty of a bond, given under the 7th section of the act 31 December 1792 (for the surrender of the register of an American vessel, in certain cases) when forfeited and recovered, is distributable, as to one moiety, among the collector, naval officer and surveyor; it is none the less a penalty, because secured by bond. *United States v. Montell*, 47.

## PLEADING.

ADMIRALTY, 4.

## POSSESSION.

SALE, 1.

## PRESIDENT OF THE UNITED STATES.

1. The president, under the constitution of the United States, cannot suspend the privilege of the writ of *habeas corpus*, nor authorize a military officer to do it. *Ex parte Merryman*, 246.

## PRESUMPTION.

1. Where plaintiff sued the proprietors of a line of stage-coaches for damages sustained by his wife, through the upsetting of one of their coaches: *Held*, that the plaintiff having proved that the carriage was upset and his wife injured, it was incumbent on the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver. *Saltonstall v. Stockton*, 11.

2. Every one that undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care, the traveller can be carried

## PRESUMPTION.

in safety ; when, therefore, a passenger is injured, the presumption is, that it has been occasioned by negligence. *Ibid.*

3. Justice, as well as the principles of evidence adopted in analogous cases, require, that any disaster by which a passenger suffers, should be *prima facie* evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary. *Ibid.*

4. A refusal to produce papers admitted to be in a party's possession, raises the strongest inference that the papers, if produced, would operate against the person holding them. *Barlett v. Kane*, 186.

## PRINCIPAL AND AGENT.

MALICIOUS PROSECUTION, 3.

1. Where the owner of a factory and store has his agent residing there, holding possession and carrying on the business in the name of his principal : *Held*, that the possession of the agent is the possession of the principal. *Comly v. Fisher*, 121.

2. The agent of an insurance company having made a change in the printed policy, by the following memorandum at the foot—"All losses under this policy to be settled agreeably to the terms of the Baltimore Insurance Company, the above notwithstanding:" *Held*, that if this memorandum was made by the agent, acting within the scope of his authority, and before the policy was delivered to the assured and accepted by them, then the loss must be settled according to the terms of the Baltimore Insurance Company. *Hugg v. Augusta Insurance and Banking Co.*, 159.

3. But if the agent was not acting within the scope of his authority, yet the plaintiff would be entitled to recover, if the jury find that the article insured was not a perishable one, in the mercantile sense of that term, as used in policies of insurance. And in determining this question, they must not look merely at the preparation and quality of this particular cargo, but must inquire and determine whether the same, as an article of commerce, is a perishable one, in the sense in which the other articles enumerated in the policy are regarded as perishable. *Ibid.*

## PRINCIPAL AND SURETY.

1. A bond given by an executor for the payment, to his surety, of one-half of his commissions, from time to time, as they may be allowed, in consideration of his consenting to become such surety, is a valid instrument. *Culbertson v. Stillinger*, 75.

2. The law will not annex to such a bond a condition precedent, that the surety shall continue solvent till the estate is finally settled, before he will be entitled to any of such commissions. *Ibid.*

3. The premium paid by the executor to the new surety, if additional security be required by the orphans' court, is not a legal set-off to an action on such bond. *Ibid.*

## PRINCIPAL AND SURETY.

4. But counsel fees paid by the executor, in establishing the amount of his commissions, will be a proper credit on the portion of commissions to be paid to the surety, in proportion to the share of said commissions which the surety is to receive. *Ibid.*

5. An agreement by the surety, not under seal (executed after the bond), not to claim any part of the commissions which may accrue during the lifetime of the testator's widow, will not be considered a condition annexed to the bond, nor a release or defeasance thereof. *Ibid.*

6. Such agreement would be enforced in a court of equity. *Ibid.*

7. Upon proceedings in equity the question would be open, as to what deduction ought to be made, for a premium paid by the executor, to procure a new surety required to be given by him in consequence of the first surety becoming insolvent. *Ibid.*

8. And upon such proceedings in equity, the question also would be open, as to whether the bond given to the first surety would create a liability to pay any part of the commissions accrued after the said surety had become insolvent. *Ibid.*

## PRODUCTION OF DOCUMENTS.

APPRAISEMENT, 17-21.

## PROTEST.

1. A protest in the following terms—"Having been informed that it is the intention of the secretary of the treasury not to make allowance on the payment of duties, on such articles as may result here less in quantity, from loss in weight or leakage, than at the time of shipment (for instance, sugar, molasses, &c.), and on which a duty *ad valorem* of the invoice is exacted, we hereby protest against the payment of such entire amount of duty, being of opinion that the law at present in force authorizes an allowance for actual loss in weight or gauge, as shown by the difference in the invoice and the returns of the weighers or gaugers of such cargoes, after delivery in this port." "We desire that this protest should extend to all our importations of sugar and molasses, since the operation of the present tariff, viz., &c.:" was held, under the act of 1845, not to apply to duties previously paid, but to apply to all duties exacted after the protest, and that a particular protest in each case was not required by the law. *Brune v. Marriott*, 132.

2. The protest is not required to be made before the payment of what are called the *estimated duties*; for this payment is necessarily regulated by the invoice *quantity*, as well as the invoice *price*. *Ibid.*

3. The protest is legally made when the duties are finally determined and the amount assessed by the collector, and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the treasury department, that he will be held personally responsible, if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice. *Ibid.*

## PROTEST.

4. The payment of money upon *estimated duties* is rather in the nature of a pledge or deposit than a payment; for it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, the surplus belongs to the importer, and is returned to him. *Ibid.*

5. The tariff acts of 1799 and 1845, do not prevent the actual owner of goods imported, from suing for the recovery of duties paid under protest by the consignee, and do not require such suits to be brought in the name of the consignee. *Mason v. Kane*, 173.

6. The tariff act of 26th February 1845, provides that no action to recover duties paid under protest, shall be maintained against a collector, "unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, *setting forth distinctly and specifically* the grounds of objection to the payment thereof." A protest under this act, objecting in general terms to the additional duty exacted, but assigning no reason for the objection, will not warrant the institution of a suit to recover back the duties objected to, even though such duties were illegally exacted. *Ibid.*

7. An appeal from the decision of the official appraisers to that of merchant appraisers was made by the importers; but on the official appraisers demanding of them the production of all documents connected with the importation, they refused to comply with the demand, withdrew the appeal, and paid the duties under protest: *Held*, that the parties, by withdrawing their appeal, and refusing to produce the papers called for, had fixed the correctness of the appraisement. *Bartlett v. Kane*, 186.

## PUBLIC OFFICERS.

1. Where an act of congress declares that an officer of the government, or public agent, shall receive a certain compensation for his services, which is specified in the law, that compensation can neither be enlarged nor diminished by any regulation or order of the president, or of a department, unless the power to do so be given by act of congress. *Goldsborough v. United States*, 80.

2. Under the acts of 3d March 1839 and 26th August 1842, an officer with a fixed salary is not entitled to any additional compensation for extra services, unless it be provided for by law, or by the regulation of an officer of the government, authorized by law to make it. *United States v. White*, 152.

3. The regulation authorized by these acts, is a general one, fixing prospectively, the additional compensation for specific services, within the limits prescribed by law, and graduating it in different places, as he may, in his discretion, deem just and most advisable for the public interest. *Ibid.*

4. He is not authorized to give or refuse compensation, at his discre-

## PUBLIC OFFICERS.

tion or pleasure, in each particular instance, after the service is performed. *Ibid.*

5. A navy-agent, therefore, is not entitled to compensation beyond his salary, as fixed by law, for any extra services, although such services may be out of the district for which he is appointed, and may, more properly, appertain to the duties of another navy-agent, or even to an officer of the government filling an office of a different character: his salary is the only compensation for services required of him, and performed by him, if he hold no other office or appointment. *Ibid.*

6. He is not entitled to an allowance for the hire of a porter, unless such allowance be made by a general regulation of the secretary. *Ibid.*

7. Nor is he entitled to an allowance for services rendered as pension-agent. *Ibid.*

8. Where the secretary of the navy appointed the navy-agent at Baltimore, acting purser for the naval school at Annapolis: *Held*, that he had the right to make such appointment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed; and that the court was bound to presume, in this instance, that the power was exercised under circumstances that justified the appointment, and that such navy-agent would be entitled to the salary allowed by law to pursers. *Ibid.*

9. The circumstance that he held the office of navy-agent, at the same time, can make no difference; there is no law which prohibits a person from holding two offices at the same time. In the absence of any legal provision to the contrary, this appointment was valid; although, as a matter of policy, it would be highly exceptionable, in most cases, as a permanent arrangement. *Ibid.*

10. The navy-agent is entitled to office rent and clerk hire, and to engage them by the quarter; if he is dismissed from office, before the end of the quarter, he will be allowed for the whole quarter. *Ibid.*

## PURSERS.

1. An acting purser in the navy, holding no other naval office at the time, is not entitled to the commission of  $2\frac{1}{2}$  per cent. upon the money disbursed by him for the government. *Goldsborough v. United States*, 80.

2. The compensation of an acting purser for services rendered in the ordinary line of his official duty, is regulated by the act of 18 April 1814, which declares that a purser shall receive \$40 per month and two rations a day; and as the secretary could not increase this compensation, by enlarging the monthly allowance, or by increasing the number of rations per day, neither can he do it in the shape of commissions, when no such commissions are given by law. *Ibid.*

3. There is no distinction in this respect between a purser and an acting purser; the latter being lawfully in the office of purser, and authorized to perform its duties, is entitled to the compensation which the law has provided for such service, and to nothing more. *Ibid.*



PURSERS.

4. The act of congress of 3d March 1809, does not apply to the office of purser. *Ibid.*

5. The plaintiff's intestate, as acting purser, had a right, in his transactions with individuals, to the profits and advances authorized by the regulations of the navy department, which regulations were unquestionably consistent with the law creating the office of purser, and warranted by it, and were, therefore, lawfully issued by the secretary, and binding upon the parties concerned. *Ibid.*

RELEASE.

SEAMEN, 4.

REPLEVIN.

ADMIRALTY, 9.

SALVAGE, 6.

RESTITUTION.

1. Lumber having been taken from the respondent's possession by process which the district court had no jurisdiction to issue, a writ of restitution would be awarded, if there were any question between the parties as to the right of property or of possession, which the court considered an open one; but as the respondent claimed no property in the lumber, but merely the right to retain possession until paid for services which were not of a nature to give him that right, it would be unreasonable and unjust to deprive the owner of the possession he had obtained, merely to subject him to the necessity of recovering it again, in a new suit in a court of common law. *Tome v. Four Cribbs of Lumber*, 533.

RIGHT OF ACTION.

1. Where defendant contracted for the purchase of a house, and agreed to pay the purchase-money in instalments, at specified periods, but afterwards repudiated the contract, in a suit brought by the vendor for the breach: *Held*, that no action could be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before the suit was instituted. *Greenway v. Gaither*, 227.

2. A notification by the defendant, that he would not fulfil his contract, did not authorize an immediate suit on it, because none of the payments to be made by the defendant were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which a suit at law could be immediately brought. *Ibid.*

RIOT.

MUNICIPAL CORPORATIONS.

SALE.

1. Where the owner of a factory and store has his agent residing there, holding possession and carrying on the business in the name of his principal: *Held*, that the possession of the agent is the possession of the

## SALE.

principal: if the principal assign the goods in such store and factory to the agent, though for a *bonâ fide* consideration, still such goods will be liable for the debts of the principal, unless the agent, in some manner, make known to the public, the change of possession, and that he no longer holds the goods as the property of his former principal, but in his own right. *Comly v. Fisher*, 121.

2. If such sale be private, without witnesses, or visible change in the possession or ownership, it will be void as against the creditors of the vendor, until the change in the title, and the character of the possession, be so made known. *Ibid.*

## SALVAGE.

## ADMIRALTY, 8.

1. Where rafts of lumber, anchored in the Susquehanna River at Port Deposit, within the flux and reflux of the tide, are driven from their anchorage by a high wind and tide, but are not broken up, and whilst floating down the stream, are rescued and brought to the shore: *Held*, that this is not a salvage service. *Tome v. Four Cribs of Lumber*, 533.

2. The person so rescuing it acquires no lien on the lumber, and has no right to retain it from the owner; his remedy is an action at law to recover the value of the service rendered. *Ibid.*

3. This is one of the usual accidents of the lumber trade; if the owners choose to expose their property to the risk, they have a right to do so, and no one can acquire a lien upon the lumber by interfering with it without their authority. *Ibid.*

4. Although no one was on the raft, yet it was no derelict on that account, or abandoned by those who had the care of it; for it is not the usage of the trade to keep any one on board, while the raft is at anchor. *Ibid.*

5. Such service has none of the qualities or character of the services for which the maritime law of all commercial nations allows salvage, when the property is in danger of perishing from the perils of the sea. *Ibid.*

6. When a raft is broken and scattered, any one may lawfully take measures to save it from further loss, and secure the property for the owner; but it is rather a case of finding, than of salvage service; and whatever just claim the party may have to a reasonable compensation for his service and time, he has no right to retain the property when the owner demands it; and if he do, it may be recovered in an action of replevin, in a court of common law. *Ibid.*

## SEAMEN.

1. The bond given by the master of a vessel, under the 1st section of the act 28th February 1803, bound to a foreign port, conditioned for the return of the crew to the United States, does not embrace the case of a vessel sold in a foreign port, and which does not return to the United States. *Montell v. United States*, 24.

2. It does not extend to cases where the seaman is lawfully separated

## SEAMEN.

from the ship, or is separated from her without the fault of the master or owner. *Ibid.*

3. It applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continue subject to the lawful authority of the master, and where it is in his power to bring them home. *Ibid.*

4. A paper, purporting to be a receipt by a seaman to the master of his vessel, for twenty-five cents, "for assault and battery, in full of all dues and demands," with a witness's name to it, and on which are two wafer seals (in the absence of proof that either of the seals is that of the person giving the receipt), cannot operate as a release, in the technical sense of that word, as known to the common law. *Mitchell v. Pratt*, 448.

5. Such receipt may operate as an acquittance, given upon the compromise and settlement of an unliquidated and disputed claim for damages for the assault, if the settlement were fairly made, when the seaman was free from improper influence, and had an opportunity of exercising his free and deliberate judgment. *Ibid.*

6. But in order to entitle it to support, it must appear to be a reasonable satisfaction, or, at least, the contrary must not appear. *Ibid.*

## SEAMEN'S WAGES.

1. A vessel owned by the respondent, a citizen of the United States, was captured by a British cruiser, during the last war with Great Britain, near San Andres, in Spain, within a mile of the shore, and within the jurisdiction of Spain, with which nation the United States were then at peace; the owner put in a claim, under the Florida treaty, on the ground that Spain had not discharged her neutral obligations in this matter, and was bound, therefore, to make reparation for the injury sustained by him: he was allowed, on account of such claim, for the vessel and cargo, and for the outward freight, but the amount awarded and received fell far short of the amount found to be due: the libellant was mate of the vessel, at the time of the capture, and was detained as a prisoner of war, until exchanged, when he returned to the United States, after the lapse of more than a year from the time he had left, having earned no wages after he left the vessel. On a libel filed by him against the owner of the vessel, to recover his wages up to the time of his return to the United States: *Held*, that where freight is earned, or damages recovered in lieu of it, the seamen are entitled to wages. *Ardrey v. Karthaus*, 379.

2. That the only exception to this rule is, the case of recovery against the underwriters. *Ibid.*

3. That capture by a public enemy forms no such exception. *Ibid.*

4. That wages were recoverable in this case only to the day of condemnation, and that no deduction should be made from them, on account of the insufficiency of the sum received by the owner to cover his whole loss. *Ibid.*

## SET-OFF.

PRINCIPAL AND SURETY, 3-4.

## SHIP-OWNERS.

LIENS, 4-5, 10-12.

1. The owners are not personally responsible for debts contracted by the master for repairs, beyond the value of the ship and freight. *Naylor v. Baltzell*, 55.

2. Nor can any terms inserted in a bottomry-bond, by the master, make them responsible for a greater amount. *Ibid.*

3. A bottomry-bond executed by the master, hypothecating as well the cargo as the ship and freight, will not render the owners of the ship personally responsible to the owners of the cargo, beyond the value of the ship and freight. *Ibid.*

4. If the owner of the cargo stand by and suffer the cargo to be sold under the bottomry-bond, without requiring evidence of the necessity for the repairs, it will not avail him, in an action against the ship-owners, to show that the necessity did not exist. *Ibid.*

5. Where work was done upon a vessel owned by two persons, but registered in the name of one only, and the libellants, who did the work, had no knowledge, at the time, of the interest of the other owner: *Held*, that the owner, whose name did not appear in the register, was liable, as well as the other. *Jones v. The Rattler*, 456.

## SLAVE-TRADE.

1. The appellant built and fitted out two vessels at Baltimore, for a Portuguese merchant named De Sylva, member of a mercantile house at Bahia, and residing in Cuba; they were built under the superintendence of two men sent to Baltimore for that purpose from Havana, and who were to have command of the two vessels when built; De Sylva placed \$14,000 in the hands of the appellant, his factor, in Baltimore, to be applied towards the construction of the vessels, and offered to pay any further sum that might be required. When the first of these vessels, called *The Anne*, was ready for sea, she was registered as the appellant's own property, and the usual oath of ownership taken by him at the custom-house; as soon as she was so registered, she was seized by the collector, and proceedings were instituted against her in the district court, under the second section of the act of congress of the 20th April 1818, on the ground that she was fitted out for the slave-trade, and the appellant appeared to these proceedings as her claimant; it was proved on the trial, that she was built and fitted out for the slave-trade, and that the appellant knew she was intended to be so employed: *Held*, that as the contracts for building the vessels were made with the appellant, and the bills and expenses paid by him, as factor for De Sylva, the vessels must be regarded as built, fitted out and equipped by him, as factor for De Sylva, in the sense in which those words are used in the act of congress. *Strohm v. United States*, 413.

## SLAVE-TRADE.

2. If the guilty purpose were entertained by the owner for whom the vessel was built or equipped, it is immaterial, whether the person who builds her or equips her, as factor or master, were apprised of it or not. *Ibid.*

3. In order to work a forfeiture, a criminal intent must exist in the mind of the party who is lawfully entitled to direct the employment of the vessel; if the owner place the vessel under the control of a factor or master, who builds or equips her, with that unlawful intention, having at the time authority from the owner to direct the employment of the vessel, the offence described by the law is committed, and the vessel is liable to the penalty. *Ibid.*

4. As the factor or master derives his authority over the vessel from the owner, she is, in his hands, responsible as fully, for any violation of law, as if the owner were present and directed it. *Ibid.*

5. The fair construction of the act of congress is, that where the criminal purpose is proved to exist in the owner, or in the factor or master, who has the direction of the vessel at the time she is built or fitted out, the forfeiture attaches; and if the owner entertained the purpose, or the factor or the master, having at the time the control and direction of the vessel, the purpose of either one of the three being proved, it is not necessary to bring home the knowledge or purpose to either of the other two. *Ibid.*

## STATE LAWS.

1. The circuit courts of the United States administer the laws of the states in which they sit, unless those laws are in conflict with the constitution of the United States, or its treaties, or the acts of congress. *Meade v. Beale*, 339.

2. These courts regard the decisions of the highest judicial tribunals of the state, when based upon the laws of the particular state, as conclusive evidence of the law affecting the right or claim in dispute. *Ibid.*

3. In cases depending upon the usages of commerce, and the general principles of commercial law, where the state court does not decide the case upon any particular law of the state, or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive evidence of the commercial law of the state; and will not be followed by the federal court. *Ibid.*

## STATUTE OF LIMITATIONS.

## LIMITATION.

## STATUTES CONSTRUED.

## CONSTRUCTION.

1789, September 24. Jurisdiction of district courts. *Gittings v. Crawford*, 1.

## STATUTES CONSTRUED.

- 1789, September 24. Juries. *United States v. Dow*, 34.  
 1789, September 24. Amendments. *Lane v. Beltzhoover*, 110.  
 1790, April 30. Crimes. *United States v. Dow*, 34.  
 1792, December 31. Registry of vessels. *United States v. Montell*, 47; *Allen v. United States*, 112.  
 1799, February 28. Fees. *Case of the Clerk's Case*, 453.  
 1803, February 28. American seamen. *Montell v. United States*, 24.  
 1809, March 3. Pursers. *Goldsborough v. United States*, 80.  
 1814, April 18. Navy. *Goldsborough v. United States*, 80.  
 1818, April 20. Slave-trade. *Strohm v. United States*, 413.  
 1820, February 10. Imports and exports. *Karthauss v. Frick*, 94.  
 1832, July 14. Tariff. *Hoffman v. Williams*, 69; *Karthauss v. Frick*, 94; *Riggs v. Frick*, 100.  
 1838, July 7. Steamboats. *Virginia and Maryland Steam Navigation Co. v. United States*, 418.  
 1839, March 3. Public officers. *United States v. White*, 152.  
 1842, August 26. Public officers. *United States v. White*, 153.  
 1842, August 30. Tariff. *Brune v. Marriott*, 132; *Tucker v. Kane*, 146; *Bartlett v. Kane*, 186.  
 1845, February 26. Duties paid under protest. *Brune v. Marriott*, 132; *Mason v. Kane*, 173.  
 1846, July 30. Tariff. *Brune v. Marriott*, 132.  
 1847, February 22. Passengers. *United States v. The Anna*, 549.  
 1848, May 17. Passengers. *United States v. The Anna*, 549.

## STEAMBOATS.

1. The proper construction of the act of congress of the 7th July 1838, in relation to steamboats, is, that more than six months must not elapse after one examination of a steamboat's boilers, before another is made. *Virginia and Maryland Steam Navigation Co. v. United States*, 418.

2. In a proceeding under that act, against a steamboat, to recover the penalty incurred by carrying goods and passengers, without having had her boilers inspected within the preceding six months, the corporation owning the vessel appeared as claimants, by the name of "The Virginia and Maryland Steam Navigation Company," but their correct corporate name was "The Virginia and Maryland Steamboat Company;" the decree of the district court was, "that the owners of the steamboat Jewess forfeit and pay to the United States the sum of \$500, one-half to the informer; and that the said steamboat, her tackle, apparel and furniture be sold," &c.: *Held*, that as the corporate owners of the steamboat had voluntarily appeared as claimants, the corporation, under the name by which it appeared (even though the wrong one), were parties to the suit, and no objection could be taken to the decree for want of process against them. *Ibid*.

## STEAMBOATS.

3. But that the decree, so far as it was against the owners, was erroneous, by reason of the form of the proceeding. *Ibid.*

4. That the penalty imposed by the act of congress could not be recovered from the owners, in an admiralty proceeding, by libel. *Ibid.*

5. That the mode of recovering the penalty from them, prescribed by the 11th section of the act, was by suit or indictment, according to the forms of the common law. *Ibid.*

6. But that, so far as it directed a sale of the vessel, the decree was correct. *Ibid.*

## TARIFF.

## DUTIES ON IMPORTS.

## TORT.

1. Injuries received by a passenger, in consequence of the negligence of the carrier, are not violations of a contract between the parties, but are breaches of the duty imposed by law on the carrier; they are torts; but the plaintiff may waive the tort and sue in assumpsit. *Saltonstall v. Stockton*, 11.

## UNASCERTAINED DUTIES.

## PROTEST, 2-4.

## USURY.

1. The constitution of Maryland, art. 3, sect. 49, declares, "that the rate of interest in this state, shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." *Held*, that under this provision, a contract by which a higher rate of interest than six per cent. is taken or demanded, is void, not only for the excess, but for the whole amount; and cannot be enforced in a court of justice. *Dill v. Ellicott*, 233.

2. A contract to do an act forbidden by law, is void, and cannot be enforced in a court of justice. *Ibid.*

3. There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal. *Ibid.*

4. It is true, no penalty or forfeiture is incurred by reason of the usurious contract, until the legislature shall prescribe it; but the incapacity to maintain an action upon such contract is no *forfeiture* or *penalty*, for no right of action is acquired under it, and therefore, there is nothing to forfeit. *Ibid.*

5. Although the Maryland act of 1845, ch. 352, abrogates the penalties inflicted by the act of 1704, ch. 69, in cases of usury, and permits the party to recover the sum actually loaned, with legal interest thereon, yet the contract, so far as the usurious interest is concerned, is still made void, and the policy of the former law upon the subject in that respect, remains unaltered. *Thomas v. Watson*, 297.

## WAGES.

SEAMEN'S WAGES.

## WAIVER.

BOTTOMRY, 8.

CONSIDERATION, 7.

FRAUD, 2-3.

STEAMBOATS, 2.

## WITNESSES.

1. Independently of the state laws, there is nothing that renders a negro incompetent as a witness. *United States v. Dow*, 34.

2. In Maryland, negroes were not competent witnesses in any case wherein a Christian white person was concerned; but they were competent to testify against all others. *Ibid.*

3. A negro was competent to testify against a Malay, though a Christian; a Malay was not deemed a white man. *Ibid.*

4. In an action for the breach of a charter-party, in not furnishing a cargo, the master of the vessel is incompetent to testify to there having been no unnecessary delay on the voyage; because by contract with the owners he was to have half the gross profits of the voyage, and man and victual the ship, and pay half the port-charges, and therefore, was interested in the result of the suit. *Hall v. Hurlbut*, 589.

5. His becoming disabled, and employing another master to complete the voyage, would not render him competent, as it did not release him from the obligation to man and victual the vessel for the residue of the voyage; the person employed by him to act as master being merely his substitute and agent, for whose wages he would be responsible; and he, and not his substitute, being entitled to one-half the gross profits. *Ibid.*

THE END.

















